Supreme Court, U.S.
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No. [redacted]1270

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

SCOTT P., BY AND THROUGH HIS GUARDIAN,
BESS P. AND RICHARD E.P.,
Petitioner

vs.

CARLISLE AREA SCHOOL DISTRICT,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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134 pp

QUESTION PRESENTED

A. Whether the Court of Appeals erred in establishing an unprecedented standard of review under the Individuals With Disabilities Education Act, which standard (1) affords substantial deference to a state administrative special education reviewer, while (2) permitting the state reviewer to overturn a trial level hearing officer's assessment of the credibility and weight to be afforded to witnesses who were observed only by the trial-level hearing officer?

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IN THE SUPREME COURT OF THE UNITED STATES

SCOTT P., BY AND THROUGH HIS GUARDIAN, BESS P. AND RICHARD E.P.,
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vs.

CARLISLE AREA SCHOOL DISTRICT,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Scott P., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled proceeding on November 9, 1995.

OPINIONS BELOW

The opinion and judgment of the Third Circuit Court of Appeals, dated August 8, 1995, and amended on October 24, 1995, was reported (unamended) at 62 F.3d 520 (3rd Cir. 1995). A copy of the opinion is reproduced in the Appendix at p. 5a and the amendment is found at 1a. The Order and Opinion of the United States District Court for the Middle District of Pennsylvania, dated August 4, 1994, was not reported, and is reproduced in the Appendix at p. 45a. The unreported Opinions of the Pennsylvania Special Education Appeals Panels dated July 6, 1994, April 27, 1994, and March 3, 1993 are not reported and are reproduced in the Appendix at pgs. 58a, 72a., and 81a. The Opinion of the Special Educator Hearing Officer dated January 7, 1993 is unreported and is reproduced in the Appendix at p. 94a.

JURISDICTIONAL STATEMENT

On August 8, 1995, the Third Circuit Court of Appeals entered judgment and opinion affirming in part and reversing in part the action of the United States District Court for the Middle District of Pennsylvania which affirmed the judgment of a Pennsylvania Special Education Appeals Panel. A Petition for Rehearing and Rehearing In Banc was denied on November 9, 1995, by the Third Circuit Court of Appeals.

The jurisdiction of this Court to review the judgment of the Third Circuit Court of Appeals is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

20 U.S.C. Section 1401(18), (20)

> (18) The term 'free appropriate public education' means special education and related services that -
> (A) have been provided at public expense, under public supervision and direction, and without charge,
> (B) meet the standards of the State educational agency,
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.
> (20) The term 'individualized education program' means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who

shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents, or guardian of such child, and, whenever appropriate such child, which statement shall include -

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting,

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative

strategies to meet the transition objectives.

20 U.S.C. Section 1412(1)

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:
(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

20 U.S.C. Section 1415(b),(e)(1),(e)(2)

(b) Required procedures; hearing
(e) Civil action; jurisdiction
(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.
(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United

States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hearing additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

CONCISE STATEMENT OF THE CASE

This case involves a determination of the appropriate special educational program for Scott P., a blind, brain injured, physically handicapped young man who was born on February 12, 1973. Scott is generally confined to a wheelchair. In August, 1980, Scott P. was injured in a swimming pool accident, and suffered a closed head injury which resulted in brain injury, cortical blindness, light spastic hemiplegia, irritable bowel syndrome, gastroesophageal reflex, von Willebrandt's disease, temporomandibular joint dysfunction, status post cholecystectomy, status post ventriculoperitoneal shunt, and vocal chord weakness. Since the accident, Scott has been susceptible to depression, migraine headaches, recurrent sinus and strep infections, gastrointestinal problems and hepatitis C.

Prior to the accident, Scott attended regular kindergarten and first grade classes; since the accident, he has been enrolled in several special education programs in public schools. During the 1991-92 school year, Scott's parents/guardians, Richard P. and Bess P., and the Carlisle Area School District were unable to agree upon an appropriate educational program for Scott. In the Spring of 1992, the A.I. duPont Institute conducted extensive evaluations of Scott's needs over several weeks; as a result of these evaluations, the duPont Institute recommended that Scott be placed in an intensive residential program at the Maryland School for the Blind in order to allow Scott to attain greater independence.

In light of DuPont's recommendation, and given Scott's failure to progress in previous years in the District's programs, Scott's family and his private evaluator determined that he required the specialized

educational placement for blind students provided at the Maryland School for the Blind. The District continued to maintain that it could provide an appropriate program for Scott in a program for children with a variety of disabilities which the District would purchase from the Capital Area Intermediate Unit; this program was set forth in the District's 1992-93 Individualized Education Program for Scott. In September, 1992, Scott's family followed the advice of the duPont Institute and other professionals, and enrolled Scott in the Maryland School for the Blind; they also requested due process proceedings concerning Scott's educational program.

Due process hearings were conducted before Dr. Joseph French, a state hearing officer, on December 3, 15 and 17, 1992. On January 7, 1993, Dr. French issued a comprehensive report and order which directed the District to develop an IEP for Scott which would provide academic, social, and vocational instruction with blind peers, and ordered that this instruction occur beyond the normal school hours; the need for such instruction is the direct result of Scott's brain injury. The effect of this order was to require that the District provide residential programming for Scott at the Maryland School for the Blind, as neither the District nor the Intermediate Unit could provide such an IEP in their existing programs. Dr. French also ordered that Scott receive six months of compensatory education due to the District's failure to provide an appropriate program for Scott during the 1991-92 school year.

The District filed exceptions to the decision of the hearing officer. On March 3, 1993, a Pennsylvania Special Education Appeals Panel, Ms. Anne Hartwig presiding, issued a decision which all parties and the District Court recognized as confusing and contradictory; the order attached to the

Appeals Panel opinion affirmed the grant of compensatory education and ordered substantial changes to the 1992-93 IEP, but appeared to order a program which was not residential.

On April 2, 1993, the Carlisle Area School District filed a complaint pursuant to 20 U.S.C. Section 1415 in the United States District Court for the Middle District of Pennsylvania to challenge the grant of compensatory education; the complaint alleged that "the panel erroneously ordered changes to Scott P.'s Individualized Educational Program that are in conflict with the narrative discussion in the panel's decision." The parents of Scott P. filed a cross-appeal seeking a residential program and tuition reimbursement for costs which they had paid to the Maryland School for the Blind. A brief evidentiary hearing was conducted on January 24, 1994, at which the District Court heard additional evidence concerning Scott P.'s program at the Maryland School for the Blind.

On March 30, 1994, District Judge William Caldwell ordered that the case be "remanded to the Pennsylvania Special Education Appeals Panel for clarification....". On April 27, 1994, a "clarification" was provided by Ms. Hartwig; unfortunately, this "clarification" was anything but clear, and on June 8, 1994, District Judge Caldwell again remanded this case to the Appeals Panel for clarification. On July 6, 1994, a second "clarification" was provided by Ms. Hartwig. On August 4, 1994, District Judge Caldwell decided the case, stating that he was affording the determination of the Appeals Panel "considerable deference" despite his finding that "the renderings of the Appeals Panel remain somewhat confusing" and despite severe criticism of the Panel's opinions. As a result of this deference to the Appeals

Panel, District Judge Caldwell affirmed the Appeals Panel's decision. Scott P. appealed to the Third Circuit Court of Appeals.

On August 8, 1995, a panel of the Third Circuit Court of Appeals affirmed Judge Caldwell's denial of tuition reimbursement, but reversed his grant of compensatory education. As a result, Scott P. received no enhanced educational program. A petition for hearing was filed, and on October 24, 1995, the Third Circuit Panel issued an amended opinion in support of its denial of compensatory education. On November 9, 1995, the full Third Circuit denied rehearing in banc.

REASONS FOR GRANTING THE WRIT

A. The Decision of the Third Circuit Court of Appeals Has Created a Serious Conflict of Authority on the Issue of Scope of Review in Special Education Proceedings Under the Individuals With Disabilities Education Act.

The Third Circuit's opinion has resulted in a serious conflict concerning the scope of review in special education due process proceedings under the Individuals With Disabilities Education Act. 20 U.S.C. Section 1401 et. seq. IDEA provides that extensive procedural due process protections must be provided to children with disabilities by the states, which may choose either a one-tier or a two-tier due process system. Where a state selects a two-tier system (such as Pennsylvania) the initial due process hearing is conducted by a hearing officer at the local educational level, with an "impartial" and "independent" review to take place at the state educational agency level. 20 U.S.C. Section 1415(c). One half of all states use a two-tier system, including many of the more populous states.

This case involves an important unresolved question under the Individuals With Disabilities Education Act concerning the proper level of deference which district courts and state review officers must afford to factual findings of trial level hearing officers. This Court has held that under the Individuals With Disabilities Education Act, 20 U.S.C. Section 1415, a federal district court must afford "due weight" to state administrative proceedings in evaluating a claim under IDEA. Board of Education v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). However, this court has not spoken to the weight which a second-tier reviewer must afford the trial-level hearing officers under IDEA, and

the Third Circuit's decision in this case has created a split of authority on this important issue.

Unfortunately, IDEA is silent on this issue, and the existing case law now provides inconsistent guidance as to the weight to be afforded to the trial level hearing officer's factual findings by the state administrative reviewers and by the federal courts. This determination is a critical question in cases under IDEA, since if the second-tier reviewer provides little or no deference to contested factual determinations of the trial-level Hearing Officer -- who is the only factfinder to see the witnesses and to judge firsthand the credibility and weight to be given to witnesses' testimony -- then the entire state administrative process becomes skewed, distorted and thoroughly unpredictable. Moreover, if the federal district court thereafter provides deference to a state reviewer who has provided inadequate deference to the trial-level hearing officer, the inevitable result will be inappropriate and inaccurate decisions under IDEA at the federal court level. This is precisely what occurred in this case.

In this case, the Pennsylvania Appeals Panel quite clearly afforded no deference to the carefully drafted factual findings of the trial-level hearing officer, and the Appeals Panel drafted an opinion and order which was so confusing that the District Court twice remanded the matter to the Panel for clarification. Even after two "clarifications" by the Appeals Panel, the District Court remained unclear as to the reasoning and decision of the Appeals Panel, yet the District Court nonetheless -- and incredibly -- afforded "considerable deference" to the Appeals Panel, while severely criticizing its "renderings" as "confusing", "vague" and containing "ambiguity".

The question of the appropriate level of deference to be afforded by federal district courts and second-tier reviewers to the factfinding of the trial-level hearing officers has long been an issue of serious national confusion in special education jurisprudence. Neither the courts nor Pennsylvania's Special Education Appeals Panels ever clearly or consistently articulated a standard of review prior to the Third Circuit's consideration of this case. See, Perry A. Zirkel, The Standard of Review Applicable to Pennsylvania's Special Education Appeals Panel, 3 Widener J. Public L. 871, 876 (1994).

It was against this background that the Third Circuit Court of Appeals decided this case and set forth an unprecedented, unusual, and exceptionally broad standard of second-tier appellate review, by holding that

> appeals panels reviewing the fact findings of hearing officers in two-tier schemes (such as Pennsylvania's) exercise plenary review, except that they should defer to the hearing officer's findings based on credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion.

Significantly, there is nothing in IDEA or any special education case which supports this very unusual and extraordinarily confusing standard. Unfortunately, from a practical standpoint, the new standard

always permits a state level reviewer to reverse the fact-finding of the trial level hearing officer, as every special education case necessarily includes conflicting "non testimonial [i.e. documentary] extrinsic evidence...[which] would justify a contrary conclusion". Indeed, this new standard was promptly criticized in the leading periodical of special education shortly after the Court's decision. The Special Educator, "Second-Guessing on Due Process?", October 13, 1995.

The extent of deference by a federal court to second-tier reviewer which has reversed trial-level factual determinations is now the subject of a clear split of authority. In Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1991), the Court of Appeals for the Fourth Circuit addressed a situation remarkably similar to that at Bar. In Doyle, a trial-level hearing officer heard conflicting testimony concerning the appropriate program for a disabled child. The hearing officer weighed the evidence, found the school district's witnesses to be unconvincing, and ordered that the child be funded at a private school which had been selected by the parents. The district appealed the decision to a state-level review officer who took no additional evidence, re-weighed the evidence, and held for the district. On appeal to the federal district court, the district judge agreed with the review officer and found no violation of IDEA. On appeal to the Fourth Circuit Court of Appeals, the court reversed, holding that the district court should have afforded no deference to the appellate review officer. The Doyle court stated that the "discrediting of a witness who [the reviewer] has not seen or heard testify, in the face of the crediting of the same witness by a hearing officer who has seen and heard the witness testify, is...far from the accepted norm of a fact-finding process designed to discover truth. [W]e

think the due weight which should be accorded the decision of the reviewing fact-finding officer depending on [such a] credibility decision is none." 953 F.2d at 104 (emphasis added).

The Doyle court held that "findings of fact by the hearing officers in cases such as these are entitled to be considered prima facie correct", and "that when fact-findings are regularly made and entitled to prima facie correctness, the district court, if it is not going to follow them, is required to explain why it does not." 953 F.2d at 105. The Doyle standard is thoroughly at odds with the enigmatic standard established by the Third Circuit, and creates an important conflict of authority on a critical procedural issue under IDEA. No other court or second-tier reviewer has adopted a review standard which is even remotely akin to the Third Circuit's approach, but the influence of the Third Circuit's decisions in special education is broad, and its approach--although novel and unsupported by IDEA--is now likely to be considered by other federal courts. Perhaps most importantly, the Third Circuit's unusual standard now gives second-tier appellate reviewers carte blanche to reverse all credibility and weight determinations of the trial hearing officer so long as any non-testimonial (i.e., documentary) evidence -- which is plentiful in every special education case -- would "justify a contrary conclusion".

Moreover, following argument before the Third Circuit, two of Pennsylvania's three Appeals Panels spoke definitively on their view of the standard of second-tier appellate review. These appeals panels provided a standard that is quite different from -- and dramatically more narrow than -- that enunciated by the Third Circuit:

> In Pennsylvania a Hearing Officer's

> findings of fact are subject to a limited scope of review on appeal. Essentially, we are empowered to determine whether the Hearing Officer's findings are based upon substantial evidence on the record, confirming that they are not legally erroneous. It is equally clear that when this scope of review is exercised the finder of fact is entitled to considerable deference on appeal as to matters involving credibility of witnesses.... The Hearing Officer's findings should be judged by whether they are supported by substantial evidence drawn from the record as a whole.

In re The Educational Assignment of James K. A second appeals panel also adopted the "substantial evidence test" in June, 1995. In re The Education Assignment of Shawnn G.

The narrow "substantial evidence" standard of appellate review set forth in James K. and Shawnn G. is one which is well known to appellate practice in general, and to Pennsylvania administrative jurisprudence in particular. Hills Department Store v. Workmen's Compensation Appeal Board, __Pa.Cmwlth.Ct.___, 646 A.2d 1272 (1994) (defining substantial evidence as "that quantum of relevant evidence which a reasonable mind could deem adequate to support a conclusion."). No jurisprudential reason exists to compel Pennsylvania (and twenty-four other two-tier

states) to now use the broader standard set forth in Scott P..

Moreover, although the Third Circuit suggested that the National Labor Relations Board's administrative processes somehow provides useful precedent for the novel standard set forth above, it curiously cited only two labor cases which (1) embrace the far more deferential "substantial evidence" standard, or (2) require second-tier reviewers to respect first-tier credibility findings. The Third Circuit made no examination of similar state administrative processes, even though the Pennsylvania special education due process appeal procedure is a state administrative process which is permitted, though not mandated, under IDEA. Significantly, the best known (and most analogous) state administrative process in Pennsylvania is the workmen's compensation system, and that process uses a typical "substantive evidence" standard of second-tier review. In Hills Department Store, the Pennsylvania Commonwealth Court held that in Pennsylvania's workmen's compensation two-tier system

> the [first-tier] referee is the ultimate fact-finder, who must determine witness credibility and evidentiary weight. In this role, the referee freely evaluates the evidence offered and can accept or reject any witness' testimony in whole or in part, including that of [expert] witnesses.

646 A.2d at 1275 (internal citations omitted).

Consequently, the Scott P. decision is contrary to both prior federal precedent and to recent decisions of Pennsylvania's own appeals panels. Moreover, the Third Circuit decision fails to articulate whether a state must use the new and novel standard of review, or whether a state may choose to use another standard of review so long as its review remains "independent". As such, the Scott P. decision has not only created a conflict between the circuits, but also now leaves the question of standard of review in special education matters more unsettled within the Third Circuit than prior to its issuance.

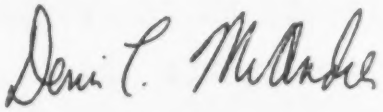
CONCLUSION

The Petitioner requests review before this Court in order to clarify the issue of scope of review under the Individuals With Disabilities Education Act.

These issues are important in the administration of IDEA and have far reaching consequences for children with disabilities.

The Petition for Certiorari should be granted.

Respectfully submitted,



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February 5, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 94-7520 and 94-7539

CARLISLE AREA SCHOOL

v.

SCOTT P., BY AND THROUGH HIS GUARDIAN,
BESS P. AND RICHARD E. P.,

Appellant in No. 94-7520

CARLISLE AREA SCHOOL DISTRICT,

Appellant in No. 94-7539

v.

SCOTT P., BY AND THROUGH HIS GUARDIAN,
BESS P. AND RICHARD E. P.

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 93-cv-00458)

Argued: March 10, 1995

Before: BECKER, SCIRICA, and WOOD,*
Circuit Judges.

(Opinion Filed: August 8, 1995)

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*. The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Circuit, sitting by designation.

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ORDER AMENDING OPINION

The opinion in the above-captioned case filed August 8, 1995 is amended as follows:

On page 29 of the slip opinion, beginning with the first full paragraph, the text will now read as follows:

The facts of this case patently do not approach the more culpable conduct described in these cases, and hence we need not decide whether to adopt, e.g., the Second Circuit's approach, nor do we need precisely to define the standard except to note that it is necessary, but not sufficient, to demonstrate that some IEP was actually inappropriate, and that bad faith is not required. In this case, there can be no award of compensatory education because the record does not contain any evidence pertaining to the inappropriateness of the 1991-92 IEP, the program serving as the basis for the award. The only evidence bears on Scott's lack of progress. But as we have explained, appropriateness involves only a prospective evaluation of the IEP, not an after-the-fact measurement of the student's success under the plan.

Even if there were some record on the appropriateness of the 1991-92 IEP, and even were we to adopt the Second Circuit's view that a plaintiff seeking compensatory education must prove a gross or prolonged deprivation of the right to a free appropriate education, the compensatory education award would still be erroneous since there is simply no indication of any gross or prolonged deprivation by the

district. The district's ignorance of the parent's dissatisfaction with the 1991-92 IEP (due to their failure to contest that program) precludes a finding that any deprivation was prolonged.[9] . . .

BY THE COURT:

/s/ Edward R. Becker

Circuit Judge

DATED: October 24, 1995

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[9]Although the fact that the appropriateness of the 1991-92 IEP was not properly challenged renders any further analysis of the school district's culpability unnecessary, we note that the district court appeared to misapprehend the standard. The district court seemed satisfied that the parents' challenge to the 1992-93 IEP made the school district aware of the alleged deprivation occurring during 1991-92. We emphasize, however, that the 1991-92 IEP would have to have been contested at the proper time before a court even considers whether the district's failure to remedy the allegedly inappropriate IEP was prolonged.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 94-7520 and 94-7539

CARLISLE AREA SCHOOL

v.

SCOTT P., BY AND THROUGH HIS GUARDIANS, BESS P. AND RICHARD E. P.,

Appellant in No. 94-7520

CARLISLE AREA SCHOOL DISTRICT,

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v.

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On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 93-cv-00458)

Argued: March 10, 1995

Before BECKER, SCIRICA, AND WOOD,*
Circuit Judges.

(Filed: August 8, 1995)

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*. The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Circuit, sitting by designation.

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OPINION OF THE COURT

BECKER, Circuit Judge.

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1485 (1990). The underlying administrative proceeding against the Carlisle Area School District was commenced by Scott P., a disabled twenty year old, through his parents, Richard P. and Bess P. on the grounds that the school district had not fulfilled its statutory obligations to Scott under IDEA. The hearing officer at the local educational level granted the relief requested, i.e., residential placement, and six months' compensatory education (to extend beyond Scott's 21st birthday.) An appeals panel at the state education agency level reversed the residential placement order but affirmed the award of compensatory education. The school district appealed this decision to the District Court for the Middle District of Pennsylvania, and the parents cross-appealed. The district court affirmed the decision of the appeals panel. The parents appeal the denial of residential placement. The school district appeals the award of compensatory education.

The appeal presents several questions of special education law of first impression in this Circuit. First, we must address the parents' contention that the administrative and judicial proceedings were procedurally defective because of an alleged violation of IDEA's efficiency-oriented finality requirements stemming from the district court's two remands to the appeals panel for clarification. Although the parents assail the fact that the district court twice remanded the case to the appeals

panel, we hold that these remands did not violate IDEA's finality requirements since they advanced rather than impeded the goal of safeguarding access to meaningful judicial review.

Second, the appeal requires us to decide the proper scope of review to be used by a state appeals panel reviewing a local hearing officer's decision, and the proper scope of review by the district court in reviewing a ruling of a state appeals panel. We conclude that the appeals panel's review is plenary except that it is required to defer to the hearing officer's credibility determinations unless non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion. The district court may reach an independent decision, except that it must accord the decision of the state agency "due weight" in its consideration. In a related vein, we also address the parents' claim that the appeals panel and the district court misallocated the burden of proof on the appropriateness of the proffered Individualized Educational Program ("IEP"). We conclude that, while school districts bear the burden of proving the appropriateness of the educational plans they proffer, they are not required to prove the inappropriateness of any competing plans advocated by parents.

Next, we consider whether the appeals panel applied the correct standard in reviewing the order for residential education. As the district court correctly recognized, IDEA requires a placement calculated to confer only some educational benefit (not an optimal education), and also that the program be delivered in the least restrictive environment. On the developed record, the district court did not err in concluding that residential placement was not proper, and thus it correctly affirmed

the appeals panel's reversal of the residential placement order.

Finally, we must determine the appropriate standard for the award of compensatory education and the correctness of the award in this case. Compensatory education effectively extends the disabled student's entitlement to a free appropriate education beyond the normal cutoff point, which occurs when the child reaches age 21. We conclude that the award of compensatory education was improper here because there was no record evidence of any violation during the year purporting to serve as the basis for the award, and certainly no gross or prolonged deprivation, which other courts have required as a precondition to a compensatory education award.

I. FACTS AND PROCEDURAL HISTORY

Scott P., who was born on February 12, 1973, sustained serious brain injuries resulting in cortical blindness in a 1980 swimming pool accident.[1] Prior to the accident, Scott attended regular kindergarten and first grade, but has been enrolled in various special educational programs since that time.

During the 1991-92 school year, Scott's parents and the school district were unable to agree upon an appropriate

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[1]The accident also caused light spastic hemiplegia, irritable bowel syndrome, gastroesophageal reflex, von Willebrandt's disease, temporomandibular joint dysfunction, status post cholecystectomy, status post ventriculoperitoneal shunt, and vocal chord weakness. Additionally, Scott has been susceptible to depression, migraine headaches, recurrent sinus and strep infections, gastrointestinal problems and hepatitis C.

educational program for the 1992-93 year. The plan offered by the school district would have enrolled Scott in a physical support class at the Mechanicsburg High School operated by the Capital Area Intermediate Unit ("CAIU"). One other blind student and two students suffering from head trauma were also assigned to this class. Scott's parents contested the appropriateness of this plan because of its resemblance to the 1991-92 IEP, under which they contended Scott had not progressed.

The parents thereupon took Scott to the A.I. duPont Institute, which conducted an evaluation of Scott's needs. The duPont Institute recommended that Scott be placed in an intensive residential program at the Maryland School for the Blind ("MSB") so that he could attain greater independence. In light of this recommendation, and given Scott's failure to progress in preceding years, Scott's family and his private evaluator submitted that he needed (and that the IEP should provide) the specialized educational placement for blind students provided at MSB. In September, 1992, Scott's family enrolled him in MSB; they also requested the statutorily-provided due process proceedings in order to contest the educational program the school district had proposed for Scott. At issue was the district's obligation to reimburse Scott's parents for his education at MSB.

Due process hearings were conducted before a state hearing officer, Dr. Joseph French, on December 3, 15, and 17, 1992. Based on documentary evidence and the testimony of various experts and teachers, Dr. French filed a report and order directing the school district to develop an IEP for Scott that would provide academic, social, and vocational instruction with blind peers. The order also specified that such instruction continue beyond normal school hours. The effect of this order was

to require that the school district provide (i.e., pay for) residential programming for Scott at the MSB, as neither the District nor the CAIU could accommodate such an IEP in their existing programs. Dr. French also ordered that Scott receive six months of education beyond his 21st birthday to "compensat[e] for the first half of the current [1992-93] school year." Op. at 9 (citations omitted).

The school district filed exceptions to Dr. French's decision. On March 3, 1993, a Pennsylvania Special Education Appeals Panel, Anne Hartwig presiding, issued a decision which acknowledged the inadequacy of the 1992-93 IEP, and ordered more instruction with blind peers, but reversed the order of residential placement. Although the panel recited that it had given "due deference" to the hearing officer's findings of fact, it rejected the finding that Scott required programming beyond normal school hours on the grounds that the record evidence taken as a whole did not support the conclusion that Scott required a residential placement in order to provide programming beyond normal school hours. However, the panel affirmed the award of compensatory education.

On April 2, 1993, the school district appealed the decision of the appeals panel by filing a complaint in the District Court for the Middle District of Pennsylvania alleging that "the panel erroneously ordered changes to Scott P.'s Individualized Educational Program that are in conflict with the narrative discussion in the panel's decision." A brief evidentiary hearing was conducted on January 24, 1994, at which the District Court heard additional evidence concerning Scott's program at MSB. On March 30, 1994, the district court, which found the appeals panel decision confusing, ordered that the case be "remanded to the Pennsylvania Special Education Appeals Panel

for clarification . . . ."

On April 27, 1994, Hartwig delivered a clarification for the appeals panel. The district court was still dissatisfied with this "clarification," which purported to find the 1992-93 IEP appropriate even though the panel had ordered modifications to the program in its original opinion; moreover, in justifying its award of compensatory education, the panel had declared the 1991-92 IEP inappropriate even though the appropriateness of that program had not been challenged and had not served as the basis of the hearing officer's award. The district court therefore remanded this case to the appeals panel for another clarification. On July 6, 1994, Hartwig issued a second "clarification." The district court, while commenting that the "renderings of the Appeals Panel remain somewhat confusing," stated that it was according the appeals panel's decision "considerable deference" and affirmed its order. The parents appeal the denial of the residential placement; the district appeals the award of compensatory education.

II. FINALITY

The parents make a claim of procedural defect based on regulations under IDEA which require that the hearing officer issue a final order within 45 days of the parents' request for a hearing and that the appeals panel's decision must be issued within 30 days of the request for an appeal. 20 U.S.C. § 1415(e)(1); 34 C.F.R. § 300.512. The parents allege that the district court violated their procedural rights under IDEA by twice remanding the action to the appeals panel for clarification. We disagree.

In Muth v. Central Bucks School District, 839 F.2d at 124-26 (3d Cir. 1988), rev'd on other grounds, 491 U.S. 223, 109 S.

Ct. 2397 (1989), we specifically prohibited the use of remands to administrative hearing officers for further proceedings. Muth, however, dealt with a remand by the secretary of the state agency to the appeals panel, not a remand by a judge. Moreover, Muth rested on the rationale that remands to the administrative hearing officer obstructed the party's access to judicial review. To prohibit the court from remanding for clarification would impair the court's ability to review the decision fairly and undermine the very policies animating Muth. The fact that these particular remands did not aid the court in disposing of this case does not invalidate the remands. Thus, while the statute clearly proscribes remands within the state's administrative system, we see no basis for prohibiting judicial remands.

III. STANDARD OF REVIEW

A. Introduction

A good deal of the briefing and argument in this appeal has focused on the standard of review. This attention results from the fact that three applicable levels of review are at issue -- our review of the district court's order; the district court's review of the state appeals panel's decision; and the appeals panel's review of the hearing officer's decision. We, of course, exercise plenary review over the district court's conclusions of law and review its findings of fact for clear error. Wexler v. Westfield Bd. of Educ., 784 F.2d 176, 181 (3d Cir.), cert. denied, 479 U.S. 825, 107 S. Ct. 99 (1986). Because the parents here allege that the district court failed to observe its own proper scope of review, we must determine whether the district court erred in its interpretation or application of the law governing the administrative review process, a question over which we exercise plenary review.

Louis W. Epstein Family Partnership v. KMart Corp., 13 F.3d 762, 765-66 (3d Cir. 1994).

The parents' burden of proof and finality arguments also hinge on legal interpretations, and are thus subject to plenary review. Id. We review the district court's determination of the 1992-93 IEP's appropriateness, a factual question, see Association for Community Living v. Romer, 992 F.2d 1040, 1044 (10th Cir. 1993); Hampton School Dist. v. Dobrowolski, 976 F.2d 48, 52 (1st Cir. 1992), under a clearly erroneous standard, Hassine v. Jeffes, 846 F.2d 169, 174 (3d Cir. 1988), while we exercise plenary review over the legal standard relied upon to evaluate the IEP and to approve the award of compensatory education. Wexler, 784 F.2d at 181.

B. Discussion

The parents' threshold argument is that the district court erred when, despite the fact that the state appeals panel did not properly defer to the findings and recommendations of the hearing officer, it affirmed the panel's order. As we have noted, the administrative regime at issue here creates two questions pertaining to the appropriate standard of review. First, we must determine what degree of deference the appeals panel owes the hearing officer. Second, we must decide the degree of deference owed by a district court reviewing an appeals panel's reversal of the hearing officer, and we must determine whether the appeals panel deserves less deference when it contravenes the hearing officer's factual findings.

1. The Statutory Framework.

IDEA requires that states receiving federal funds for education must provide every disabled child with a "free appropriate public education." 20 U.S.C.

§ 1412(1) (1990). The core of this entitlement is provided by the IEP, the package of special educational and related services designed to meet the unique needs of the disabled child. See Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 173 (3d Cir. 1988), cert. denied, 488 U.S. 1030, 109 S. Ct. 738 (1989). Regulations promulgated under IDEA entitle parents dissatisfied with their child's IEP to "an impartial due process hearing." 20 U.S.C. § 1415(b); 34 C.F.R. § 300.506-512. States may choose either a one- or a two-tier administrative system. Pennsylvania has a two-tier system in which the initial hearing occurs at the local educational agency level followed by an "independent" review of that hearing at the state educational agency level. 20 U.S.C. § 1415(c) (1990). Federal regulation § 300.510, promulgated under § 1415(c), provides that an "impartial" officer is to conduct the review and that such officer should make an "independent decision." See 34 C.F.R. § 300.510 (1993).

A party aggrieved by a final order of the state authorities may appeal to federal court. Section 1415(e) of IDEA provides that district courts "shall receive the records of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e) (1990). Although this provision could be read to permit the district court to review the evidence de novo, disregarding the findings and rulings of the state agencies, the Supreme Court has required that federal district courts afford "due weight" to state administrative proceedings in evaluating claims under IDEA. See Board of Educ. v. Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 3051 (1982). As we explained in Oberti v. Board of Education, 995 F.2d

1204, 1219 (3d Cir. 1993), district courts have discretion to determine how much deference to accord the administrative proceedings, and although the district courts "must consider the administrative findings of fact, [they are] free to accept or reject them." Id. at 1219 (quoting Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853, 857 (11th Cir. 1988)). But if the district court chooses to depart from the agency's ruling, it should provide some explanation for its departure. See Doyle v. Arlington County School Bd., 953 F.2d 100, 105 (4th Cir. 1991).

The ramifications of Rowley's injunction to give "due weight" are unclear where a state creates a two-tiered administrative regime and each tier arrives at a different conclusion. The circuits have split on the question whether federal district courts acting pursuant to Rowley should accord due weight to the trial level hearing officer or to the appeals panel where the two bodies differ and where the appeals panel may not have properly deferred to the hearing officer's findings. In Thomas v. Cincinnati Board of Education, the Court of Appeals for the Sixth Circuit held that the "only logical position" was to defer to the appeals panel, the final decision-maker of the state agency, over the hearing officer. 918 F.2d 618, 624 (6th Cir. 1990). See also Karl v. Board of Education of Geneseo County School Dist., 736 F.2d 873, 877 (2d Cir. 1984) ("We believe Rowley requires that federal courts defer to the final decision of the state authorities, and that deference may not be eschewed merely because a decision is not unanimous or the reviewing authority disagrees with the hearing officer."). In contrast, the Fourth Circuit has held that the district court erred in deferring to a reviewing officer who, reversing the hearing officer, discredited a witness he had not seen or heard testify. See Doyle, 953 F.2d

at 100.

At the threshold, we must decide whether the appeals panel failed to defer to the hearing officer, for if we find that the appeals panel adequately deferred to the hearing officer, then the district court plainly complied with Rowley in according "considerable deference" to the appeals panel's decision. Because the provisions of IDEA that accommodate the two-tier due process system do not specify the proper standard, see Perry A. Zirkel, The Standard of Review Applicable to Pennsylvania's Special Education Appeals Panel, 3 Widener J. Public L. 871, 876 (1994), we must first decide what that standard is.

a. Appeals Panel Review of the Hearing Officer's Decision

Section 1415(c) describes the state agency's review as follows: "If the [initial impartial] hearing ... is conducted by a local educational agency ..., any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State Education Agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review." 20 U.S.C. § 1415(c) (emphasis added). The regulation interpreting this provision further provides that the reviewing officer may "[s]eek additional evidence if necessary," and may "[a]fford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official." 34 C.F.R. § 300.510(b)(3)-(4) (1993) (emphasis added). Although this language does not explicitly define the appeals panel's scope of review,

it suggests a non-deferential standard.[2] The fact that the statute contemplates that the appeals body will make an "independent decision" suggests not that the appellate body should defer but that it should reach a decision based on its own evaluation of the evidence, "independent" of the findings of the hearing officer. The language of the regulation, see 34 C.F.R. § 300.510(b)(3) (1993), bolsters this interpretation, since the receipt of additional evidence necessarily entails the weighing of the new evidence against the evidence presented in the first (administrative) hearing.

As a matter of general appellate principle, however, appeals panels ordinarily defer to the trial presider's factual findings based on credibility judgments about the witnesses presented at the trial or hearing. For example, Rule 52(a) of the Federal Rules of Civil Procedure states: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be

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[2]We need not address the question whether federal law pre-empts state laws which specify the appeals panel's standard of review since the Pennsylvania statute creating the apparatus for the two-tiered due process hearing is silent on this issue. The Pennsylvania statute provides: "The decision of the impartial hearing officer may be appealed to a panel of three appellate hearing officers. The panel's decision may be appealed further to a court of competent jurisdiction. In notifying the parties of its decision, the panel shall indicate the courts to which an appeal may be taken." 22 PA. CODE § 1464(m) (1992). The Pennsylvania courts have not consistently interpreted this statute to impose a definitive standard of review. See Zirkel, 3 WIDENER J. PUBLIC L. at 878-82.

given to the opportunity of the trial court to judge the credibility of the witnesses." Fed. R. Civ. P. 52(a). See also Anderson v. Bessemer City, 470 U.S. 564, 575, 105 S. Ct. 1504, 1512 (1985) (requiring even greater deference to the trial court's findings regarding the credibility of witnesses than to the court's other fact findings).[3] But deference to a factfinder's particular credibility judgment does not necessarily result in deference to all of the findings of fact based on that judgment.

While review of credibility-based factual findings is limited, it is not meaningless. "Where . . . the findings . . . are not supported by the record, and indeed, the record supports contrary findings, we must reverse." Ali v. Gibson, 631 F.2d 1126, 1129 (3d Cir. 1980), cert. denied, 449 U.S. 1129 (1981); see also Anderson, 470 U.S. at 575, 105 S.Ct. at 1512 (restricting deference to cases where credibility evidence is not contradicted by "extrinsic evidence"); Cooper v. Tard, 855 F.2d 125, 126 (3d Cir. 1988) (limiting appellate review to an assessment of whether there is enough evidence on the record to support such credibility findings).

We thus embrace the Fourth Circuit's approach in Doyle v. Arlington County School Board, 953 F.2d at 105, to the extent that that decision was premised on this specific principle, that credibility-based findings deserve deference unless non-

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[3]Obviously, conclusions of law receive plenary review. See, e.g., Louis W. Epstein Family Partnership v. KMart Corp., 13 F.3d 762, 765-66 (3d Cir. 1994) (applying plenary review to choice, interpretation and application of the law to the historical facts). Moreover, a trial court cannot shield a legal error from review simply by labelling it as a factual finding. Id.

testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion. But beyond this rather narrow class of record-supported, credibility-based factual findings, we think that, to give the statute's language about "independent" decisions effect, the appeals panel must have much more leeway in reviewing other non-credibility based findings of the hearing officer. See Zirkel, 3 Widener J. Public L. at 892. We will therefore defer to the appeals panel rather than the hearing officer in most circumstances, bringing us closer to the approach taken by the Second and Sixth Circuits in Karl v. Board of Education of Geneseo and Thomas v. Cincinnati Board of Education, respectively. See supra at p. 11-12.

Our approach is also consistent with administrative law principles, which permit an agency or board freely to accept or reject an ALJ's findings and conclusions of law. Section 557(b) of the Administrative Procedures Act (APA) provides: "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b) (1995). Courts review the board's decisions, not those of the ALJ's. Starrett v. Special Counsel, 792 F.2d 1246, 1252 (4th Cir. 1986) (citing 3 K. Davis Administrative Law Treatise, § 17.16 (2d ed. 1980)).

Moreover, limiting the appeals panel's deference to those situations involving record-supported credibility determinations tracks the approach taken by other administrative regimes, such as that created by the National Labor Relations Act. 29 U.S.C. § 151 et seq. (1973 and Supp. 1995); see Stein Seal Co. v. NLRB, 605 F.2d 703 (3d Cir. 1979) (holding that the Board

was free to make fact findings contrary to the ALJ's so long as they are supported by substantial evidence); Local 259, United Auto., Aerospace and Agr. Implement Workers v. NLRB, 776 F.2d 23 (2d Cir. 1985) (upholding the decision of the Board where differences between ALJ and the board did not result from divergence of views as to credibility of testimony concerning evidentiary facts but instead resulted from differences in overall judgment as to proper inferences and ultimate determination).

We thus hold that appeals panels reviewing the fact findings of hearing officers in two-tier schemes (such as Pennsylvania's) exercise plenary review, except that they should defer to the hearing officer's findings based on credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion.

b. District Court Review of the Appeals Panel

As we noted, see supra at 11, IDEA empowers the district court to hear additional evidence, and directs the court to base its decision on the preponderance of the evidence. We have interpreted Rowley's mandate to accord "due weight" to the administrative proceedings as a requirement to consider -- although not necessarily to accept -- the administrative fact findings. Oberti, 995 F.2d at 1219. The precise question here is whether the district court owes less consideration to the administrative fact findings when the second tier reversed the first tier. Clearly, the district court's review should be unaffected where the appeals panel owes no deference to the hearing officer. Thus, the issue is whether the district court's review should be any less deferential where the appeals

panel disregarded a record-supported, credibility-based factual determination of the hearing officer.

Given our decision about the appeals panel's scope of review, we conclude that a district court should still give "due weight" to the appeals panel's decision when it reverses the hearing officer's conclusions of law, inferences from proven facts, and factual findings based on credibility judgments where non-testimonial, extrinsic evidence justified the appeals panel's contrary decision.[4] In this case, because

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[4]We assume without deciding that, under IDEA, a district court should accord somewhat less consideration to an appeals panel ruling that disregards a hearing officer's credibility judgments where this standard is not met. We base this assumption on the standards applicable in other statutory regimes that also involve a two-level administrative proceeding. See Chen v. General Accounting Office, 821 F.2d 732 (D.C. Cir. 1987) (requiring administrative board to accord great deference to those findings of original decision maker that turned on credibility judgments); Brock v. L.E. Myers Co., High Voltage Div., 818 F.2d 1270 (6th Cir. 1987) (requiring Occupational Safety and Health Review Commission to articulate reasons for failing to credit findings of an ALJ who had a unique opportunity to observe demeanor of witnesses); Citizens St. Bank v. Federal Deposit Ins. Corp., 718 F.2d 1440 (8th Cir. 1983) (scrutinizing agency's decision where agency departed from ALJ's finding without reflecting attentive consideration to ALJ's decision); Haberson v. NLRB, 810 F.2d 977 (10th Cir. 1987) (requiring NLRB to accord ALJ findings due weight although board is not bound by ALJ findings). Cf. Stein Seal Co. v. NLRB, 605 F.2d 703 (3d Cir. 1979) (regarding the ALJ's findings as "merely

the appeals panel found that the extrinsic evidence in the record supported conclusions contrary to those of the hearing officer,

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advisory" where the Board's contrary findings are supported by substantial evidence). But see Starrett v. Special Counsel, 792 F.2d 1246 (4th Cir. 1986) (allowing Merit Systems Protection Board to accept or reject ALJ's findings and conclusions of law). The National Labor Relations Act caselaw specifically addressing the issue of judicial review of administrative appeals also suggests that, although district courts should normally defer to the Board's decisions, the courts should be less deferential where the Board reached a decision contrary to the ALJ's. See GSX Corp. of Missouri v. NLRB, 918 F.2d 1351 (8th Cir. 1990) (reviewing board's findings more critically where board's findings are contrary to ALJ's); C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB, 921 F.2d 350 (1st Cir. 1990) (applying "slightly" less deferential standard to the board where it reaches a conclusion opposite to the ALJ); Centre Property Management v. NLRB, 807 F.2d 1264 (5th Cir. 1987) (applying "more searching" scrutiny to board's findings where they conflict with ALJ's); NLRB v. Cooper Union for Advancement of Science and Art, 783 F.2d 29 (2d Cir. 1986) (applying higher scrutiny to board findings that differ from ALJ's but only where differences concern evidence that turns on credibility). But see Glaziers Local Union 558 v. NLRB, 787 F.2d 1406 (10th Cir. 1986) (applying the same standard to the board whether or not it reached conclusions contrary to the ALJ). Because the disputed portions of the hearing officer's opinion did not find support in the non-testimonial, extrinsic evidence in the record, however, they were not entitled to deference by the appeals panel, and we need not decide this issue.

the district court correctly gave the panel's decision "due weight" notwithstanding the panel's differences with the hearing officer.

2. The Nature of the Disputed Rulings.

We turn to the nature of the disputed rulings, for application of the standard of review turns thereon. While this discussion will propel us to some degree into a discussion of the merits, treated infra, that cannot be avoided. Although Scott's parents understandably want this court to view the contested portions of the hearing officer's ruling as record-supported credibility judgments that would be shielded from appeals panel review, they are in reality credibility findings that are contradicted by not insubstantial record evidence. With respect to the appeals panel's finding that the 1992-93 IEP was appropriate, the parents claim that the appeals panel "effectively overturned the critical finding by the Hearing Officer that 'for the last few years [Scott's] academic achievement, as determined by his teacher, has been (only) maintained and when measured by standardized tests has continued to be at the fourth to fifth grade level.'" The record, however, contained ample evidence that Scott had made progress. When measured by teacher-constructed exams, Scott's academic achievement had improved. HO Op. at 4. The record also notes that Scott had made progress in reading and writing braille. Id.

In any event, appropriateness is judged prospectively so that any lack of progress under a particular IEP, assuming arguendo that there was no progress, does not render that IEP inappropriate. See infra at 30-32. However, even if the observation about progress under the 1991-92 IEP did reflect on the legal appropriateness of the 1992-93 IEP, it could not, standing alone, support the hearing officer's

conclusions about the 1992-93 IEP: additional inferences and conclusions would have to be drawn. For example, one would have to assume that Scott's needs had remained completely unchanged between the years, and that one could attribute Scott's lack of progress during 1992-93, for example, to the failure of the 1992-93 program to provide a service for a need that had manifested itself during the 1991-92 year (prior to the development of the relevant IEP).

Consequently, the appeals panel would not have needed to set aside Dr. French's "findings" about the credibility of the teacher and the mobility specialist who testified that they had seen no progress in recent years to find that the 1992-93 IEP was appropriate. Rather, the appeals panel could have credited their statements and nevertheless found that the 1992-93 plan passed muster because of the additions to the 1992-93 program[5] or because of changes

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[5]The plaintiffs' argument that the compensatory education award mandates residential placement depends on the identity of the 1991-92 IEP with the 1992-93 IEP, but there are some important differences. The 1992-93 plan provides for psychological counseling with blind youths, OT/PT monitoring, and transition planning, three "related services" not supplied in the earlier plan. The 1992-93 IEP also contains a much more detailed set of goals/predictions in the "Content" section, and a much more specific list of "Specially Designed Instruction." Additionally, the later program reflected more ambitious "Expected Post-School Outcomes," listing, for example, supported employment or sheltered employment where the earlier plan had only stated "will explore more specific evaluations." Compare generally, 1992-93 IEP, 582-596a, with 1991-92 IEP, 702a-710a.

in Scott's needs. Alternatively, the appeals panel could have concluded that the non-testimonial, extrinsic evidence in the record evidence did not support the findings.

While either of these approaches could independently justify the appeals panel in making a finding different from the hearing officer, the appeals panel invoked both bases in this case. The panel carefully distinguished the content of the 1992-93 IEP from that of the 1991-92 IEP (see 4/27/94 Order at 2), thus breaking the link between progress made under prior IEPs and the appropriateness of the 1992-93 IEP. The panel also evidenced its searching review of all the record evidence when it stated that "there was sufficient evidence in the record so as to allow the officer to find that the District had attempted to provide Scott with an [appropriate] IEP . . . ." (4/27/94 Order at 2.)

At all events, the core issue in this case pertains to the state appeals panel's reversal of the hearing officer's award of residential education at the MSB. The parents contend that the appeals panel "simply rejected Dr. French's critical factual findings that 'in addition to regular therapy, Scott needs help from peers with similar problems . . . . He needs programming beyond typical school hours to have sufficient intensity to make additional gains.'" But here too, the appeals panel did not simply reject the testimony relied on by the hearing officer so much as find that the record did not support the officer's conclusion. In particular, the hearing officer relied on testimony that Scott needed his school instruction to be reinforced by other activities to find that these reinforcing activities needed to occur "during other hours of his day," a phrase he took to require residential placement. The appeals panel believed, however, "that there

was insufficient evidence in the record" to support the conclusion that those reinforcing activities had to occur "during other hours of his day." 4/27/94 Order at 3.

The appeals panel's rejection of the residential placement also resulted from its doubts about the attribution of Scott's failure to accept his blindness (and its effects on his progress) to the deficiency of peer contact afforded by the school district's IEP. See 3/3/93 Order at 4 n.13 ("The record seems to indicate that this inability or unwillingness by Scott to accept his handicap may account for his apparent lack of progress as anticipated by his teachers and parents. The issue, however, is whether more contact with blind peers is the remedy or whether increased skills will help Scott accept his handicap.")

Had the appeals panel found that Scott did not need any peer contact and/or that he did not require any additional programming, the appeals panel would have been rejecting well-supported testimony credited by the hearing officer. But the record evidence did not unequivocally support the hearing officer's findings with respect to progress under prior IEP's, off-hour programming, or the need for more peer contact. Because the record evidence did not support the findings, this is simply not a case where the panel encroached on the credibility judgments of the hearing officer, for we agree with the appeals panel that "the reasons why Scott has not made the anticipated progress in his educational placement remain unclear." More specifically, it appears that Scott was not attending school for the full day and missed certain extended periods due to various illnesses.

Both the appeals panel and the hearing officer felt that full implementation of the school district's IEP was impeded by those factors. See 3/27/94 Order at 2 ("The panel agreed with the Hearing Officer that a significant difficulty in evaluating the appropriateness of the proposed '92 IEP was Scott's failure to attend his school program for a full day. The officer speculated, if Scott did not go home at 1 p.m., he could have training in daily living skills provided at the school."); HO Op. at 4. As a consequence, the testimony that Scott needed more programming, even if credited, does not compel residential placement, especially in light of the 1992-93 IEP's proposal to provide "full day" programming.

Neither does Scott's need for peer contact necessarily require residential placement, since the appeals panel found that

> there was sufficient evidence in the record so as to allow the officer to find that the District had attempted to provide Scott with an IEP that would permit him an opportunity to interact with peers. While the opportunity to interact, as provided by the District, may not be have been ideal or optimal, nevertheless, the panel concluded that the District had acted in a manner that would have allowed Scott to reasonably benefit from his placement, in this context of interaction with peers.

4/27/94 Order at 2-3. Aside from the fact

that evidence supporting the need for more peer contact was contradicted, to give such testimony dispositive effect would run afoul of at least two legal propositions under IDEA (discussed below): that the district need not provide the optimal IEP, and that the program be provided in the least restrictive educational environment appropriate to the needs of the child. 20 U.S.C. § 1412(5)(B) (1990).

The panel correctly stated the law when it wrote: "The Hearing Officer's conclusion that Scott must then be entitled to a residential placement is incorrect. The standard to be applied in determining the least restrictive alternative is not to find an optimum placement for Scott but rather to decide whether an appropriate educational placement can be achieved in a non-restrictive setting." See 3/3/93 Op. at 5. Under the appropriate legal framework, therefore, even uncontroverted testimony that many more hours of programming or that contact with many peers would benefit Scott would not support the adoption of a more restrictive residential placement. Moreover, even if the appeals panel had reversed findings based on uncontradicted testimony, it would not necessarily change the result in this case. In light of Oberti, 995 F.2d 1204 (3d Cir. 1993), after considering the administrative findings of fact, the district court was free to reach a different conclusion from its independent review of the record.

Thus, the district court could effectively affirm the panel by independently finding its own facts contrary to those found by the hearing officer. Because we are confident that the district court did independently consider the record, we believe that it could affirm the appeals panel decision even if the appeals panel had acted improperly in reversing the hearing

officer's findings.[6] The same arguments refute the parents' contention that the district court erred when it affirmed an appeals panel ruling it conceded to be "somewhat confusing." The district court could effectively affirm the panel, despite its inability to precisely discern the panel's ratio decidendi, by making rulings based on its independent review of the record and the preponderance of evidence.

3. Conclusion

Because the contested "findings" of Dr. French (i.e., those over which the appeals panel and Dr. French disagree) do not find unmixed record support, we conclude that the district court correctly accorded the appeals panel "substantial consideration," notwithstanding the fact that the panel did not adopt the hearing officer's credibility-based recommendations. Moreover, to the extent that the hearing officer's recommendations offended other provisions of IDEA, they rested on an error of law over which the appeals panel exercised plenary review. Thus, we need not address the question whether the "consideration" the district court afforded the appeals panel would have been appropriate if the panel had in fact encroached on the limited terrain of credibility judgments falling within the primary purview of the hearing officer.

IV. BURDEN OF PROOF

The parents make an interesting argument that the appeals panel erroneously placed the burden of proving the

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[6]Although the district court did accord the decision of the Appeals Panel "considerable deference," its opinion also evidences an independent review of the record. See Dist. Ct. Op. at 7, 11.

inappropriateness of the 1992-93 IEP on them. Although they fail to identify any specific element(s) of the IEP on which the school district failed to demonstrate appropriateness, the parents rely on the panel's reversal of the order of residential placement as proof that the burden had been improperly shifted. Contending that the MSB provided better-- and to them the only adequate--opportunities for contact with blind peers and for expanded programming, they reason that it is also the district's burden to prove the inappropriateness of any other IEP they might advocate. We disagree.

In administrative and judicial proceedings, the school district bears the burden of proving the appropriateness of the IEP it has proposed. Oberti, 995 F.2d at 1219; Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1035 (3d Cir. 1993) ("[T]he burden of showing that the placement is 'appropriate' rests with the school district."). But that does not mean that the school district also bears the burden of proving the inappropriateness of any alternative IEP that a student's parents might suggest. Such a requirement would not only impose a very substantial burden on the district, but it would also conflict with Rowley and its progeny to the extent that such a general rule would effectively necessitate proof that a district's IEPs were the best rather than simply proof that they conferred some educational benefit.

IDEA's requirement that the placement involve the least restrictive educational environment, 20 U.S.C. § 1412(5)(B), further erodes the parent's arguments about the burden of proof. In Oberti, the school district bore the burden of proving appropriateness when it advocated a more restrictive placement, and its teachings are instructive on the question whether it is the proponent or the school district who bears the burden of proving the

necessity for a more restrictive placement. In Oberti, we recognized "a strong presumption in favor of mainstreaming", 995 F.2d at 1214, and explained that this presumption "would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom." Id. at 1219.

These principles are comparably valid here where the parents seek a more restrictive environment. It simply cannot be, in light of the clear congressional preference for inclusion, id. at 1214, that the district bears the burden of proving the superiority (not mere appropriateness) of the district's proffered less restrictive setting. We therefore will not require the district to prove the inappropriateness of the more restrictive MSB placement.

V. RESIDENTIAL PLACEMENT

The parents argue that the court erred by finding that the 1992-93 IEP was appropriate when that plan so closely resembled the 1991-92 IEP which, they assert, the court implicitly impugned by affirming the appeals panel's award of compensatory education. In addition, the parents contend that the fact that the appeals panel ordered modifications to the 1992-93 IEP (in its first 3/3/92 order) must mean that the panel regarded the 1992-93 IEP to be inappropriate. Specifically at issue is the appeals panel's reversal of that portion of the hearing officer's order, premised on the alleged inappropriateness of the 1992-93 plan, which effectively required residential education at MSB.

The principal question, however, even assuming the 1992-93 IEP was somehow inappropriate, is whether an award of residential education was the proper

response. The statutory framework imposes dual requirements on school districts. On the one hand, IDEA requires only that school districts provide an "appropriate" IEP, gauged by whether the IEP is "sufficient to confer some educational benefit." Rowley, 458 U.S. at 200, 102 S. Ct. at 3048. Districts need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by IDEA represents only a "basic floor of opportunity." Id. at 201, 102 S. Ct. at 3048. See also Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1037, 1040 (3d Cir. 1993); Kerkam v. Superintendent D.C. Public Schools, 931 F.2d 84, 88 (D.C. Cir. 1991) (refusing to test appropriateness by comparing disputed IEP with proffered alternatives). Moreover, IDEA also commands the school district officials to construct a program in the least restrictive educational environment appropriate to the needs of the child. See 20 U.S.C. § 1412(5)(B) (1990). Residential placement is, by its nature, considerably more restrictive than local extended day programming. See Kerkam, 931 F.2d at 87; G.D. v. Westmoreland School Dist., 930 F.2d 942, 948 (1st Cir. 1991); Roland M. v. Concord School Comm., 910 F.2d 983, 992-93 (1st Cir. 1990).

In our view, the district court did not err in concluding that the 1992-93 IEP was appropriate in the legally relevant sense because that program was calculated to confer some educational benefit on Scott. Although the parents' brief is not entirely clear on this point, its attack on the appropriateness of the 1992-93 IEP appears principally to rely on that plan's alleged similarity to the 1991-92 IEP, rather than make a more direct challenge to appropriateness by identifying particular needs not addressed by the 1992-93 program. This reliance is misplaced, for the alleged similarity of the 1991-92 and the 1992-93

IEP's does not mandate the conclusion that a decision ordering compensatory education is somehow irreconcilable with the refusal to order residential placement. As we explained in Fuhrmann v. East Hanover Board of Education, 993 F.2d 1031, 1040 (3d Cir. 1993), "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. . . . Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." See also Roland M. v. Concord School Comm., 910 F.2d 983 (1st Cir. 1992). Consequently, Scott's failure to make progress in the 1991-92 IEP, a judgment made retrospectively, does not render either the 1991-92 IEP or the 1992-93 IEP inappropriate. Of course, if a student had failed to make any progress under an IEP in one year, we would be hard pressed to understand how the subsequent year's IEP, if simply a copy of that which failed to produce any gains in a prior year, could be appropriate.

Moreover, the parents gloss over the many assumptions needed to equate the 1991-92 IEP that the appeals panel had found inappropriate with the status of the 1992-93 IEP. In particular, the parents believe that the two IEP's are virtually identical although they themselves concede that the 1992-93 IEP included additional goals and objectives and an arrangement for psychological counseling. (appellant's brief at 10). See also supra note 5. The parents apparently assume that these are merely formal additions, but that is not so. An IEP is a written document containing a statement of current educational status, annual goals, short term objectives, a description of the type of program and reasons for its selection, projected dates for initiation and duration, and some objective criteria by which instructional

objectives can be evaluated. 34 C.F.R. § 300.346 (1993). The differences between the 1992-93 IEP and the 1991-92 IEP are not merely formal; they reflect the very essence of an IEP. As we have explained, the statute requires that school districts prepare the IEP's based on the student's needs; so long as the IEP responds to the needs, its ultimate success or failure cannot retroactively render it inappropriate.

Importantly, the objectives and services added to the 1992-93 IEP address some of the bases the parents have used to argue for the residential placement. For instance, the district proposed group counseling for blind youths, responding to Scott's need for more contact with blind peers. The plan also responded to the need for extended hour services by providing orientation and mobility training to Scott and his family in their home, presumably during non-school hours. (Appellee's brief, n.3). And despite the parents' insistence that only the MSB can adequately educate Scott, the district's IEP addresses each of the program needs identified by the MSB diagnostic team. (Appellee's brief at 24-27). Based on this similarity to the MSB plan, the one endorsed by the parents, a correct application of the prospective appropriateness inquiry supports the district court's conclusion that the 1992-93 program was appropriate.

The parents, however, contend that only the residential placement recommended by their experts could provide Scott with the requisite "intensity" of services needed for him to make any progress. We think this argument turns on the alleged superiority of the MSB program rather than the inappropriateness of the district's 1992-93 IEP. We do not denigrate the quality of the program available at the MSB and acknowledge that Scott might have benefited more from

being in it. Nor can we doubt the parents' best intentions in attempting to seek the optimal placement for their son. But we must agree with the district court and the appeals panel in holding that program optimality is not the standard. See 3/3/92 Order at 4; Dist. Ct. Op. at 7. Rowley and Furhmann clearly hold that a program is appropriate if it confers some educational benefit; it does not need to be superior to the alternatives. See Rowley, 458 U.S. at 200, 102 S. Ct. at 3048; Fuhrmann, 993 F.2d at 1037. Even assuming that "intensity" was required to confer some benefit, the district's IEP still satisfies Rowley's appropriateness test. While the district concededly did not propose full day programming for Scott, it did offer programming that could have been more "intense" than what Scott had actually been experiencing. Due to illnesses and an evaluation at another facility, however, Scott apparently missed a substantial number of days during the 1991-92 school year, and his fatigue apparently caused his parents to insist that Scott end his school day at 1 pm, a full hour and a half early.

In sum, even if it was not optimal, the 1992-93 IEP was calculated to confer educational benefit. IDEA does not require more. In fact, on this record, the district court would have erred if it had ordered the allegedly "better" residential placement since such an order would have violated other provisions of IDEA for, as we have explained, an IEP must not only be designed to confer some educational benefit, but it also must deliver the programming in the least restrictive educational environment. See 20 U.S.C. § 1412(5)(B) (1990). Even if the 1992-93 IEP was not as responsive to the expert's recommendations as the parents might like, the court's authority to order the residential education (which may indeed provide Scott with "better" services) is limited by this

command.

Residential placement at MSB is not, of course, the least restrictive educational environment. The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled. See 20 U.S.C. § 1412(5)(B) (requiring maximal educational integration of disabled children with children who are not disabled, and restricting separate schooling to situations when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily); 34 C.F.R. § 300.552; see also Oberti, 995 F.2d at 1214-16; Cordero v. Pennsylvania Dep't of Educ., 795 F.Supp. 1352 (M.D. Pa. 1992).

One of the expressed justifications for the MSB placement was to maximize Scott's contact with disabled peers. This approach, while conferring benefits in some spheres, necessarily minimizes Scott's contact with children without disabilities, and thus directly conflicts with the statute's objective of inclusion. In a similar factual scenario, the D.C. Circuit reversed a district court's order of residential education for a child who also could have benefitted from "an integrated opportunity for daily living skill reinforcement, recreation, and peer interaction after the six-hour school day." Kerkam v. Superintendent D.C. Public Schools, 931 F.2d at 86. In Kerkam, the court explained:

> The decision [to order residential education over day placement at a district school] turned

> on [the court's] understandable concern for Alexander's best interests rather than on the appropriateness of the educational program . . . . There seems to be little doubt that Alexander would have made less progress under the [district's] program, but Rowley precludes our taking that factor into account so long as the public school alternative confers some educational benefit.

Id. at 87 (citation omitted).

This case presents the same situation. Placement at the MSB was not required under Rowley, and it conflicts with the statute. Accordingly, because the order of the district court affirming the Appeals Panel gave "due weight" to its rulings as we have explained that concept and because it otherwise properly comports with both the appropriateness and the least restrictive environment requirements, it must be affirmed.[7]

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[7]We do not reach this result without misgivings. We are acutely sensitive to the factors that so strongly motivated the hearing officer and so seriously trouble Scott's parents, namely the need for Scott to associate with similarly handicapped peers who are succeeding and who might therefore serve as role models and give him confidence that he too can succeed. We acknowledge the importance of this approach (and this goal). A placement at the MSB would apparently satisfy this need but would be attended by certain disadvantages, such

VI. COMPENSATORY EDUCATION

On cross-appeal, the school district contests the hearing officer's award of six months of compensatory education to remedy its alleged failure to provide Scott with an appropriate program during the 1991-92 year. Both the panel and the district court affirmed this award. For several independently sufficient reasons, we reverse the order of compensatory education.[8]

IDEA requires school districts to provide disabled children with free, appropriate education until they reach the

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as the lack of contact with non-handicapped peers, which IDEA elevates to legal relevance. We therefore emphasize the need for public school officials to devise means to reconcile these conflicting but compelling interests.

[8]At the threshold, we note that this argument may have been waived. The parents apparently did not contest the appropriateness of the 1991-92 IEP at the time it was offered. Indeed, they seemed to invoke the alleged inappropriateness of the 1991-92 IEP only to help them prove that the 1992-93 IEP, which they argued was nearly identical, was inappropriate. Because appropriateness is judged prospectively, see Furhmann, 993 F.2d at 1040, and discussion supra at 30-32, we have declined the parents' invitation to play "Monday morning quarterback" by judging the 1991-92 IEP in hindsight. Although we do not construe the parents' failure to press their objections to the IEP when it was offered as a waiver, it casts significant doubt on their contention that the IEP was legally inappropriate since it suggests that the parents were also unaware prospectively that the 1991-92 IEP was unlikely to confer educational benefit.

age of twenty-one. See 20 U.S.C. § 1412(2)(B) (1990). An award of compensatory education extends the disabled student's entitlement to the free appropriate education beyond age twenty-one to compensate for deprivations of that right before the student turned twenty-one. In Lester H. v. Gilhool, 916 F.2d 865, 872 (3d Cir. 1990), cert. denied, 499 U.S. 923, 111 S. Ct. 1317 (1991), we recognized that adults (i.e., individuals over twenty-one) have a remedy for deprivations of their right to a free appropriate education during the period before they reached age twenty-one. We held that Congress intended compensatory education to be available to remedy the deprivation of the right to a free appropriate education. Id. at 872-73 (citing Miener v. State of Missouri, 800 F.2d 749 (8th Cir. 1986)); 20 U.S.C. § 1415 (authorizing courts to award relief they deem appropriate). Because the Supreme Court has held that tuition reimbursement is an appropriate remedy under the EHA (IDEA's predecessor), School Committee of Burlington v. Department of Education, 471 U.S. 359, 370-71, 105 S. Ct. 1996, 2003 (1985), and because a student's access to a remedy should not depend on the parents' ability to "front" the costs of the education and sue for reimbursement, see Miener, 800 F.2d at 753, courts can, under appropriate circumstances, order districts to provide free appropriate education after the student reaches twenty-one.

We have held that compensatory education is available to respond to situations where a school district flagrantly fails to comply with the requirements of IDEA. See Lester H., 916 F.2d 865. See also Burlington v. Department of Educ., 736 F.2d 773, 801 (1st Cir. 1984), aff'd, 471 U.S. 359, 105 S. Ct. 2003 (1985) (upholding reimbursement as equitable remedy available where rights are violated). Although we do not believe that bad faith is

required, most of the cases awarding compensatory education involved quite egregious circumstances. This case does not appear to be in that category. For instance, in Lester H., we awarded compensatory education where a district took 30 months after admitting that the in-district placement was inappropriate to locate an appropriate placement despite the availability of at least six suitable schools within the state. See Lester H., 916 F.2d at 870, 873. In addition to implicating much more culpable conduct, Lester H. also explicitly reserved the question whether a court could order compensatory education for periods when a district attempts in good faith to develop an appropriate placement. Lester H., 916 F.2d at 873 n.12.

The cases from other circuits which recognize compensatory education without explicitly requiring a higher degree of intent by the district have also involved more culpable conduct. See Burr v. Ambach, 863 F.2d 1071, 1073 (2d Cir. 1988) (awarding compensatory education where state institution disqualified a student because of its purported inability to accommodate his multiple handicaps without mentioning or considering placement in an extant special program for multiple handicapped students); Jefferson County Bd. of Educ. v. Breen, 853 F.2d 854, 857-58 (11th Cir. 1988) (awarding compensatory education to deter states from unnecessarily prolonging litigation); Miener v. State of Mo., 800 F.2d 749 (8th Cir. 1986) (reversing denial of compensatory education for a child who spent three years in mental health ward of a state hospital after district failed to provide any educational services notwithstanding its own evaluation recommending such services). At least one other circuit has explicitly made a "gross" violation of IDEA a prerequisite to an award of compensatory education. See Garro v. State of Conn., 23 F.3d 734 (2d

Cir. 1994); Mrs. C. v. Wheaton, 916 F.2d 69, 75 (2d Cir. 1990) (requiring a gross violation and defining such as instances of undue delay in holding hearings or taking advantage of mental infirmity to deny a placement).

We find the Second Circuit's approach generally persuasive. Although generally speaking we believe that a plaintiff seeking compensatory education must prove a gross or prolonged deprivation of the right to a free appropriate education, the facts of this case patently do not approach this situation, and we therefore need not precisely define the standard. Two things are clear, however. First, it is necessary, but not sufficient, to demonstrate that some IEP was actually inappropriate. Second, bad faith is not required.

In this case, there can be no award of compensatory education because the record does not contain any evidence pertaining to the inappropriateness of the 1991-92 IEP, the program serving as the basis for the award. The only evidence bears on Scott's lack of progress. But as we have explained, appropriateness involves only a prospective evaluation of the IEP, not an after-the-fact measurement of the student's success under the plan.

Even if there were some record on the appropriateness of the 1991-92 IEP, the compensatory education award would still be erroneous since there is simply no indication of any gross or prolonged deprivation by the district. The district's ignorance of the parent's dissatisfaction with the 1991-92 IEP (due to their failure to contest that program) precludes a finding that any deprivation was flagrantly

prolonged.[9] Since the record does not reflect the district's awareness of the inappropriateness of the 1991-92 IEP, this case is unlike Lester H. And once the district was apprised of the arguable inappropriateness of the 1992-93 plan, it did not delay in seeking to resolve the dispute. Thus, under the circumstances of this case, it simply cannot be said that the district deprived Scott of an appropriate placement, delayed for any inordinate period of time in addressing any disputes over the program, or in any other way grossly disregarded its obligation to provide Scott with an appropriate educational program.

In any event, there was no violation shown here, since the 1991-92 IEP was not challenged and was therefore presumptively appropriate. We must therefore reverse the district court's order insofar as it awarded six months of compensatory education for the purported inappropriateness of the 1991-92 IEP.

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[9]Although the fact that the appropriateness of the 1991-92 IEP was not properly challenged renders any further analysis of the school district's culpability unnecessary, we note that the district court appeared to misapprehend the standard. The district court seemed satisfied that the parents' challenge to the 1992-93 IEP made the school district aware of the alleged deprivation occurring during 1991-92. We emphasize, however, that the 1991-92 IEP would have to have been contested at the proper time before a court even considers whether the district's failure to remedy the allegedly inappropriate IEP was prolonged.

VII. CONCLUSION

For the foregoing reasons, we will affirm the order of the district court insofar as it upheld the denial of the residential placement, but we will reverse the order insofar as it upheld the award of compensatory education.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARLISLE AREA SCHOOL DISTRICT, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-93-458
SCOTT P. by and through his guardians, BESS P. and RICHARD E. P., Defendant	:	

M E M O R A N D U M

We are considering the case of Scott P., a young man who has brain injuries, blindness, and other physical problems attributable to an accident in 1980. On January 24, 1994, we conducted an evidentiary hearing. Jurisdiction is vested in this Court according to the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. Sections 1400, et seq., and 28 U.S.C. Section 1331.

I. Background

Scott P. was a student in the Carlisle Area School District ("the district") and the Capitol Area Intermediate Unit.[1] During the fall of 1991, Scott's parents notified the school district that they were not satisfied with Scott's

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[1] During these proceedings, Scott has apparently reached an age at which he is no longer eligible for IDEA protection. Hence, this proceeding's relevance largely hinges on the issue of compensatory education, which can continue after IDEA eligibility ends.

educational progress. A year later, in September, 1992, they requested that Scott be placed in a residential program at the Maryland School for the Blind. The district denied the request and the parents sought relief from a special education hearing officer. See First Decision of the Special Education Appeals Panel (R. at 67a). That hearing officer conducted a three-day hearing in December, 1992. He rendered his opinion on January 7, 1993.[2]

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[2] The interrelationship of the hearing officer, appeal panel, and this Court were aptly described by the U.S. Court of Appeals for the First Circuit.

> [The IDEA] requires... participating states [to] adopt policies assuring all students with disabilities the right to a "free appropriate and public education." 20 U.S.C. Section 1412(a). . . . As defined by [the IDEA], the term "free appropriate public education" refers to the special education and related services that must be provided in conformity with an individualized education program (IEP). 20 U.S.C. Section 1401(a)(20). An IEP is a statement of the education program which must be written for each child and designed to meet each child's unique needs. 20 U.S.C. Section 1401(a)(19). The IEP is developed by a team including a

The precise determination of the hearing officer is a matter of some dispute in this case. The hearing officer required that the district develop an individualized education program ("IEP") that would include academic, social and vocational instruction with blind peers; that instruction during school hours be reinforced in activities during other hours of his day; that instruction in school be guided by his

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> qualified representative of the local educational agency, the teacher, the parents or guardian, and, where appropriate, the student. Id. . . . An IEP is appropriate under [the IDEA] if it provides instruction and support services which are reasonably calculated to confer educational benefits to the student. Board of Education v. Rowley, 458 U.S. 176, 203-07, 102 S.Ct. 3034, 3049-51, 73 L.Ed.2d 690 (1982). . . . Parents who believe that a proposed IEP is inappropriate are entitled to an impartial due process hearing. 20 U.S.C. Section 1415(b)(2). Any party aggrieved by the decision of the administrative hearing officer may appeal to either state or federal court. 20 U.S.C. Section 1415(e)(2).

Murphy v. Timberlane Regional Sch. Dist., 973 F.2d 13, 14-15 (1st Cir. 1992).

progress in daily living and vocational training activities; and that his education program and placement be reviewed at least annually. Decision of the Hearing Officer (R. at 9a). Additionally, the hearing officer determined that a placement at a separate facility, such as the Maryland School for the Blind, was the "least restrictive environment" ("LRE") for Scott. Id. Further, the hearing officer awarded six months of compensatory education. Id. We read the hearing officer's decision as determining that the IEP offered by the school district was inappropriate. We glean this from the requirement that the school district modify the IEP, from the nature of the exceptions filed by the school district, and from the general discussion in the decision.

On appeal, the Special Education Appeals Panel seemed to reverse the hearing officer's determination, holding that (1) the district had attempted to provide an appropriate IEP, (2) the hearing officer erred in determining that a residential placement was required, and (3) that the equities of the case warranted an award of compensatory education. (R. at 67a-73a). Despite the fact that the opinion seemed to find the district IEP adequate, the appeals panel nonetheless concluded that the district should develop an IEP that included academic, social, and vocational instruction with blind peers, reinforcement with appropriate activities.

The school district appealed to this Court, as it is entitled to do under 20 U.S.C. Section 1415. the basis of the appeal is essentially three-fold: (1) that the panel ordered changes to Scott's IEP that are in conflict with the panel's narrative discussion, (2) that the panel ordered changes to Scott's IEP that are without support in the record, and (3) that the panel awarded compensatory education

without any basis in the law. Scott and his parents counter-appealed, charging that an appropriate IEP for Scott must include a residential placement.

At the request of Scott and his parents, we held and evidentiary hearing on January 24, 1994. After submission of trial briefs, we requested a clarification from the appeals panel. Upon receipt of that clarification and further briefing by the parties, we again requested clarification. Although the renderings of the appeals panel remain somewhat confusing, we are prepared to resolve this matter.

II. Law and Discussion

A. IDEA Standards

The IDEA guarantees certain minimum educational opportunities for children and young people, like Scott, who contend with disabilities. There is no dispute that Scott was, at all times relevant to this dispute, eligible for the protection of the IDEA.

A federal court reviewing a state agency determination regarding an IEP is to make a two-fold inquiry: (1) first, whether the state agency has complied with the procedural requirements of the IDEA and (2) whether the IEP developed pursuant to these procedures is "reasonably calculated to enable the child to receive educational benefits." Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206-07; 102 S.Ct. 3034; 73 L.Ed.2d 690 (1982); Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1034 (3d Cir. 1993). An IEP must consider the "least restrictive environment" in which the educational program may be provided. See Doe v. Bd. of Educ. of Tullahoma City Schools, 9 F.3d 455, 460 (6th Cir. 1993). It is clear that the requirement that an IEP

be "reasonably calculated to enable the child to receive educational benefits" is a threshold requirement; if a school district provides even a minimally acceptable IEP, it has met its legal duty under the IDEA.

In reviewing the appeals panel decision, we are not to substitute our own notions regarding proper education for those of the educational agency and we are to give "due weight" to the administrative results. Fuhrmann, 993 F.2d at 1034. However, we are to review the record, along with any supplementation, by a preponderance of the evidence standard. Id.

In this case, we have a concern with affording undue deference to the conclusion of the appeals panel because, as we shall explain, they have been less than clear throughout this protracted litigation. We will, however, give considerable deference to the panel's determination of what should be included in an appropriate IEP for Scott, as we recognize the panel's expertise in that regard.

B. The Appropriateness of the IEP[3]

The hearing officer concluded that the Carlisle IEP was inappropriate and that Scott needed a residential placement. The appeals panel found that the hearing officer had misapplied the "least restrictive environment" standard and the panel concluded that the district had offered an

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[3]Importantly, when speaking of the "district IEP," we refer to the 1992-93 IEP, which we believe to be the one challenged by Scott's parents and passed upon by the appeals panel. Thus, our review focuses on that IEP.

appropriate IEP.[4] The panel determined that Scott needed an IEP that included interaction with blind and brain-injured peers, attention by specialist; and instruction that included vocational training, social and emotional development training, and self-care training. (R. at 69a-70a). While it is uncontested that Scott did not make the progress either his parents or his teachers had hoped for, the panel determined that a significant reason for this was Scott's parents' decision to allow Scott a shorter school day.

We must agree with the appeals panel that the district offered an appropriate IEP. The fact that the results for Scott were less than optimal can be traced to a variety of factors, most of which have no bearing on whether the district offered an appropriate IEP. The IDEA does not mandate results, it mandates an appropriate effort by school officials. Rowley, supra. The appeals panel found, and the record reflects, that part of the reason Scott did not gain significant benefit from the district IEP was his parents' willingness to shorten Scott's school day, even in the fact of contrary recommendations by school officials.

Having heard testimony of Dr. Dennis Duda, of the Maryland School for the Blind, we do not doubt that Scott might well derive greater benefit at that residential school than in the district IEP. However, our role is a limited one. Rowley, supra. The IDEA requires only a minimally

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[4]We agree with the district that much of the confusion stems from the fact that there were two IEPs, one from the 1991-92 school year and the other from the 1992-93 school year.

beneficial IEP, not an optimal program.

C. Least Restrictive Environment

The IDEA requires states to ensure that appropriate education is provided in the least restrictive environment. 20 U.S.C. Section 1412(5)(B).

The hearing officer determined that the Maryland School for the Blind is the LRE. The appeals panel disagreed, holding that there was insufficient support in the record for a conclusion that a proper IEP had to include residential placement. Part of the panel's reasoning was that there was o real way to evaluate whether the district IEP was the least restrictive environment because of Scott's unavailability to attend for the full school day.

Again, we must agree. Our determination that the district IEP was appropriate demonstrates that a proper IEP could be provided for Scott in an environment significantly less restrictive than a residential school. Had Scott attended school for full days rather than half days and still not achieved what his parents and educators desired for him, this determination might be different.

D. Compensatory Education

A troubling aspect of this case has been the aware of compensatory education.

The hearing officer awarded compensatory education with no explanation. (R. at 9a). In its initial opinion, the appeals panel affirmed the award but for reasons that are difficult to follow:

> Compensatory education is properly awarded

> when: (a) a school district has knowingly failed to provide an appropriate educational placement, or (b) a district has acted in bad faith and the district's actions have result in a denial of [free, appropriate public education]. In either case, upon balancing the equities in a case, an equitable award may be ordered.

First Decision of the Special Education Appeals Panel (R. at 72a).

We agree that the IDEA allows an award of compensatory education in appropriate circumstances. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). The issue here is what constitutes an appropriate circumstance.

The appeals board indicated two circumstances. The first is where a school district knowingly fails to provide an appropriate placement. The panel relied on Gilhood for this proposition and we agree. 916 F.2d at 873. The second circumstance, accordingly to the panel, is where the district acts in bad faith and denies an appropriate placement. For this, the panel relies on Manchester School District v. Christopher B., 807 F. Supp. 860 (D.N.H. 1992). Our review of that case, however, indicates that the court held that ". . .a compensatory education award requires neither a finding of bad faith nor a finding of a denial of special education." Id. at 871. Our research, in fact, indicates that there is no requirement of bad faith. See McManus v. Wilmette School District, No. 1 C 6497, 1992 U.S. Dist. LEXIS 18167 (N.D.Ill. Nov. 27, 1992).

While we agree that the decision to award compensatory education must involve a weighing of equities, we believe the appeals board determination was inadequately explained. It is clear from the case law that the compensatory education will be awarded only when there has been a denial of an appropriate education. Gilhool, 916 F.2d at 873. Indeed, compensatory education is intended as a cure for a past deprivation. Id. Thus, in order to support its award of six-months of compensatory education, the appeals board would have to find that there was, for a period of time, an inappropriate IEP in place. In its second opinion (the first clarification), the panel explained that it had determined that the 1991-92 IEP was inappropriate and that the 1992-93 IEP included changes that made it appropriate. Hence, the board noted that the district knew for some period that Scott's parents were unhappy with his progress yet failed to make changes to the inappropriate 1991-92 IEP.

For the purposes of the IDEA, it is not relevant that Scott's parents were dissatisfied with his progress.[5] However, the panel did find that the earlier IEP was inappropriate. See Second Decision of the Special Education Appeals Panel at 2.

While we find the panel's description vague, we conclude that there was sufficient basis in the record for the panel to hold as it did and we will uphold the award.

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[5]In saying that, we do not mean in any to diminish the difficulties confronting Scott's parents or the tremendous effort they have made on his behalf. We are merely considering the issue through the prism of the IDEA and our proper role under that statute.

III. Conclusion

Having determined that the appeals panel's determinations have support in the record and are correct by a preponderance of the evidence, we are compelled to address a further aspect of this case.

The parties have incurred considerable added expense in this matter largely attributable to the confusing decisions rendered by the appeals panel. The parties and the Court have spent significant time addressing, not the merits of this matter, but an issue that should have been quite simple: namely, what the appeals panel decided.

There are a number of examples of this confusion in the appeals panel's decisions. For example, in the third panel decision (the second clarification), the panel again notes that the two circumstances that can warrant an award of compensatory education are when a school district has knowingly denied an appropriate education and when a school district has in bad faith denied an appropriate education. However, the panel held:

> Thus, although we did not find a clear denial of [free appropriate public education] based either on the District's bad faith or knowing denial of appropriate placement, we believed that Scott was entitled to limited compensatory education.

Third Decision of the Special Education Panel at 2. In other words, the panel set forth a standard and then ignored it. We have upheld the award because we believe the panel found facts sufficient to support the

award under the appropriate standard.

Similarly, the panel explained in its second decision (first clarification) that "[t]he panel ordered that the Hearing Officer's order be affirmed with modifications, . . ." Second Decision of the Special Education Appeals Panel at 2. Yet, in the third decision (second clarification), the panel noted that "[w]e found that the Hearing Officer had erred in applying the correct legal standard in his determination of free and appropriate placement (FAPE) and in his analysis of least restrictive environment (LRE)." Third Decision of the Special Education Appeals Panel at 1-2. The first suggests that the panel largely agreed with the hearing officer. The second suggests a contrary conclusion.

There are other examples. The result of such ambiguity has been significant hardship on the parties, who sought only a straightforward application of the law to the facts developed in the hearing. We have attempted to provide some resolution to this matter, although we share the parties' clear frustration that the position of the appeals board was not succinctly explained in its initial decision.

William W. Caldwell
United States District Judge

Date: August 4, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARLISLE AREA SCHOOL DISTRICT, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-93-458
SCOTT P. by and through his guardians, BESS P. and RICHARD E. P., Defendant	:	

ORDER

AND NOW, this 4th day of August, 1994, it is ordered that the decision of the Pennsylvania Education Appeals Panel rendered on March 3, 1993, is affirmed insofar as it found that the most recent IEP offered by the Carlisle Area School District was reasonably calculated to enable Scott P. to achieve educational benefit in the least restrictive environment. Further, it is ordered that the appeals panel's award of six months of compensatory education is affirmed.

The Clerk of Court shall close this file.

William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARLISLE AREA SCHOOL DISTRICT, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-93-458
SCOTT P. by and through his guardians, BESS P. and RICHARD E. P., Defendant	:	

CLARIFICATION OF THE RESPONSE TO THE ORDER UPON REMAND

On June 8, 1994, the court remanded the order in the above matter to the Pennsylvania Special Education Appeals Panel for clarification. The court asked the panel to further clarify the panel's Response to the Order Upon Remand filed on April 29, 1994. In that response, the court had asked for clarification on the narrow issue of whether the Individuals Educational Program (IEP) offered by the Carlisle Area School District (District) was "reasonably calculated to enable the child to receive educational benefit?"

The appeals panel explained to the court that in the decision in question, there had been two separate IEP's to which the Hearing Officer had referred in his decision and order, namely, the relevant IEP, dated 11/18/92, and an earlier one, dated 11/27/91. The 1992 IEP included additional provisions not found in the 1991 IEP. The panel noted that the 1992 IEP did, albeit in a marginal manner, provide Scott with an appropriate program. Moreover, the panel

concluded that the District had acted in a manner consistent with allowing Scott to reasonably benefit from his recommended placement. Scott, in part due to his shortened school day necessitated by his fragile health needs, had not availed himself of the District's services; the parents had decided to have Scott attend his various medical appointments and clinics during the normally scheduled school afternoon hours.

We found that the Hearing Officer had erred in applying the correct legal standard in his determination of free and appropriate placement (FAPE) and in his analysis of least restrictive environment (LRE). We further concluded that, although the award of compensatory education was, in our view, proper, his rationale was lacking.

The panel believes that clarification of when compensatory education is proper is the key to understanding both the Hearing Officer's decision and our subsequent appeal and response to the court because of the relationship between FAPE and the IEP and the reasonable calculus standard. In this regard, we would respectfully direct the court's attention to our original March 1993 decision and order, Special Education Opinion Number 590. In that decision, we noted that while we agreed with the Hearing Officer that Scott was entitled to compensatory education, we disagreed with his incomplete rationale and offered our reasoned analysis as the basis for the award. In part, we stated:

> Compensatory education is properly awarded when: (a) a school district has knowingly failed to provide an appropriate educational placement [see Lester H. v. Gilhool, 916 F.2d 865

> (3d Cir. 1990)] or (b) a district has acted in bad faith and the district's actions have resulted in a denial of RAPE [see Manchester School District v. Christopher B., 19 IDELR 389 (D.N.H. 1992). In either case, upon balancing the equities in a case, an equitable award may be ordered [id.] An administrative review panel such as the Special Education Appeals Panel may order compensatory education as an equitable remedy [see Big Beaver Falls Area School District v. Jackson, 615 A.2d 910 (PA Commw. 1992). Thus, an award of compensatory education has significant judicial authority. (See Appeals Decision at 5).

The significance of our analysis is that compensatory education may be awarded as an equitable remedy when, on balance, the facts and equities in the case allow for such an award. We reasoned that in Scott's case the District could possibly have done more or at least acted sooner when it became aware of the parents' concerns about his placement and progress. However, we also reasoned that the parents' actions had made it impossible for the District to implement any modifications or changes in the IEP or in the educational program. Scott's half day attendance simply precluded his participation in most of the afternoon programming and school events and, in our view, prevented the District from determining whether Scott could or was

benefitting from the programs it did offer. Thus, although we did not find a clear denial of FAPE based either on the District's bad faith or knowing denial of appropriate placement, we believed that Scott was entitled to limited compensatory education.

In sum, as an equitable remedy, we awarded Scott a period of six months of compensatory education predicated on the balancing of the equities involved. Our reasoning is supported by our reading of recent caselaw in this jurisdiction on compensatory education awards. We believe that it is precisely in situations like Scott's, analogous to the facts in other recent cases, that the courts intended for administrative review bodies such as ours to make such an award. If, on the other hand, the standard first articulated in Gilhool, is narrowly construed and applied, then only in very limited cases, where there has been a proven denial of FAPE, will there be compensatory educational awards. In our view, as an available equitable remedy, a broader interpretation of Gilhool, is necessary; recent caselaw suggests to us such an interpretation.

We note that the problems of the two IEP's has further confounded the discussion of which IEP that Hearing Officer considered when he order "modifications" to the IEP. His order essentially restated and "fleshed out" the provisions found in the 1992 IEP with the exception of the controversial language of providing Scott with interaction with "his peers". As we observed in our decision, the record is incomplete as to whether the District's attempts to include prevocational training at VITEC and transitional classes at the Center for Industrial Training were attempts to provide Scott with said interaction. We believe that these attempts may be reasonably viewed as such. The panel, however, did not go as

far as reaching this conclusion.

We reiterate that, in the record presented to us, although a residential facility may provide optimal opportunities and better services for Scott we found that the District's proffered placement and programs were sufficient so as to make special education meaningful to Scott and thus, be reasonably calculated for Scott to meaningfully benefit from his educational placement.

Respectfully submitted,

Anne Hartwig for the Appeals Panel

Dated at Philadelphia, PA this 6th day of July. 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARLISLE AREA SCHOOL DISTRICT, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-93-458
SCOTT P. by and through his guardians, BESS P. and RICHARD E. P., Defendant	:	

M E M O R A N D U M

We are considering the cross-appeals from a determination by the Pennsylvania Special Education Appeals Panel. We exercise jurisdiction according to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Sections 1400, et seq., and 28 U.S.C. Section 1331.

I. Facts and Procedural History

Scott P. is a young man with several physical difficulties, including blindness, brain injury, and other disabilities. He was a student in the Carlisle Area School District and the parties agree that he is eligible for the various protections afforded by the IDEA. After Scott's parents and school officials were unable to agree on an appropriate individualized education program ("IEP"), a hearing officer took evidence in December, 1992. In a decision rendered in January, 1993, the hearing officer determined that the IEP offered by the school district should be modified in several ways, including provision of residential education. The school district appealed and the Pennsylvania Special Education Appeals

Panel, in March, 1993, essentially agreed that the district IEP was lacking, although it disagreed with regard to what would be appropriate.

The school district, on April 2, 1993, filed an appeal in this court, as it is entitled to do according to 20 U.S.C. Section 1415(e)(2). Scott and his parents filed what amounts to a cross-appeal on April 21, 1993, contending that the appeals board erred in the standard it set for an appropriate IEP. We held an evidentiary hearing on January 24, 1994. Having determined that the decision of the appeals panel was unclear, by order of March 30, 1994, we remanded the matter to the panel for clarification. The board replied on April 29, 1994.

During the pendency of the various appeals in this case, Scott's parents enrolled him at the Maryland School for the Blind, where he has been a student since January, 1993.

II. Discussion

We must, unfortunately, agree with Defendants that the order of clarification submitted by the appeals panel on April 29, 1994 (the "clarification order"), is not helpful. Indeed, the order contradicts in several ways the decision of the panel issued on March 3, 1993. We will note, briefly, our areas of concern.

In conclusion to its clarification order, the panel indicates that "[a]ccordingly, the panel clarifies that the most recent IEP (11/18/92), the focus of the due process hearing and the subsequent appeal, was 'reasonably calculated to enable the child to receive educational benefits.'" Response to the Order Upon Remand at 3 (footnote omitted).

In its original decision, the panel ordered that the

> District shall develop an IEP for Scott that will include academic, social, and vocational instruction with blind peers; that instruction during school hours be reinforced with appropriate activities as tolerated by Scott; that instruction in school be guided by his progress in daily living and vocational training activities; and that his educational program and placement be reviewed at least annually.

Record at 73a. The clear implication of this language is that the IEP in place at the time was not adequate and needed to be changed. Thus, the two decisions appear to contradict one another. The briefs of the parties underscores this confusion. Plaintiff argues that the first option found that the IEP was not adequate. Indeed, Defendants characterize the clarification order of the panel as repudiating and reversing the first decision.

Further, the clarification order states that "[t]he panel noted that the Hearing Officer's order pertinent to the IEP essentially affirmed the provisions which the 11-18/92 IEP contained." Response to the Order Upon Remand at 3. However, the initial decision of the appeals panel notes that "[t]he Hearing Officer ordered the District to develop an IEP that would provide academic, social, and vocational instruction with blind peers." Record at 68a. If the hearing officer had found the IEP adequate, it is difficult to discern

whey he would then require changes. Indeed, reference to the hearing officer's decision draws into question the interpretation in the clarification order.

> Evidence presented suggests that the current placement is restrictive for Scott in that he does not have blind peers who are achieving in keeping with their abilities/disabilities to model appropriate behavior and encourage him to reach levels reasonably expected of him by teachers, vision specialists, mobility specialists, and psychologists.
>
> * * *
>
> Since 1981 Scott has been in public school buildings in an attempt to maximize his association with children who are not disabled or who have other disabilities. Success in these placements has not met the expectations of professionals associated with him and do not meet his needs as an individual.

Hearing Officer's Decision, Record at 8a.

Thus, the appeals panel's response to our remand order clarifies little and, unfortunately, serves to further confuse the issues. It is clear that Defendants (Scott

and his parents) have proceeded according to their understanding that the hearing officer found the IEP inadequate and that the appeals panel essentially affirmed that decision, but on different grounds. We can well understand why they would have reached such a conclusion. Indeed, we note that the district if the party that appealed the hearing officer's decision, thus indicating that it regarded the decision as adverse to it (a fact emphasized by the district's brief to the appeals panel. See generally Record at 28a-51a). Therefore, on of two things must be the case: the appeals panel has reversed itself in the clarification order or the appeals panel has been consistent but not adequately conveyed its findings to the parties.

In either event, we are confronted with considerable obstacles, not the least of which is the potential for deprivation of due process. If the first appeals panel decision (the order of March 3, 1993) did not adequately convey the panel's conclusions to the parties, they have not had a meaningful opportunity to be heard with regard to this appeal. If the clarification order modified the March 3, 1993, decision, again the parties would have been denied a meaningful opportunity to address the panel's conclusions because they would have changed.

Defendants suggest that we afford no deference to the appeals board and review the findings of the hearing officer de novo, effectively bypassing the appeals panel. We find two problems with this approach: (1) the statutory scheme and common sense dictate that we allow state education officials the first opportunity to pass on the appropriateness of Scott's IEP and (2) the hearing officer's report is itself less than crystalline.

This case has already been delayed and we are reluctant to delay it further. However, we can not review that which is ambiguous. Therefore, we will remand once gain to the Special Education Appeals Panel for clarification. We caution that we seek a clarification, not a reconsideration, by the panel. We sit to review the decision of March 3, 1993. The clarification should simply explain what the panel intended in the earlier order and changes to the conclusions in that decision would be inappropriate.

The clarification should provide us with the following:

1. A clear explanation of the findings, namely whether the IEP challenged by Scott and his parents was "reasonably calculated to enable the child to receive educational benefits." If the panel indicates that the IEP was adequate, it should point to the relevant provisions of the March 3, 1993, decision that indicated as much.

2. If the panel found that the IEP was adequate, the clarification should explain why the panel then ordered modifications to the IEP and why the panel ordered compensatory education.

The panel's response to this order should contain a detailed elucidation of the original decision. If the clarification does not resolve the ambiguities in the March 3, 1993, order, other appropriate action may be required.

We will issue an appropriate order.

William W. Caldwell
United States District Judge

Date: June 8, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARLISLE AREA SCHOOL DISTRICT, Plaintiff :

vs. : CIVIL ACTION NO. 1:CV-93-458

SCOTT P. by and through his guardians, BESS P. and RICHARD E. P., Defendant :

O R D E R

AND NOW, this 8th day of June, 1994, it is ordered that:

1. This case is remanded to the Pennsylvania Special Education Appeals Panel for clarification of the issue described in this order.

2. The appeals panel shall file such clarification with this Court on or before July 8, 1994. The panel shall also serve copies of its clarification on counsel.

3. The Court retains jurisdiction over this case.

4. The Clerk of Court shall forward a copy of this order to Ms. Anne Hartwig, 118 Colwyn

Lane, Bala Cynwyd, Pennsylvania 19004. The Clerk of Court shall further forward to Ms. Hartwig copies of the Supplemental Brief of the Carlisle Area School District in Reply to Response of Special Education Appeals Panel, filed May 20, 1994 (document No. 31), and Reply of Scott P. and his parents, filed May 31, 1994 (document No. 32). The Special Education Appeals Panel shall consult with counsel in complying with this order and in preparing its submission to this court.

5. Plaintiff and Defendants may each file a brie, not to exceed 10 pages, within ten (10) days of service of the panel's clarification.

William E. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARLISLE AREA SCHOOL DISTRICT, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-93-458
SCOTT P. by and through his guardians, BESS P. and RICHARD E. P., Defendant	:	

RESPONSE TO THE ORDER UPON REMAND

On March 30, 1994, the court remanded the order in the above matter to the Pennsylvania Special Education Appeals Panel for clarification. Specifically, the court asked the panel to clarify whether the IEP offered by the Carlisle Area School District was "reasonably calculated to enable the child to receive educational benefits?"

The panel has reconsidered the record before it and has set out below the response to the court's request for clarification.

BACKGROUND

The due process hearing for Scott P. was held in December, 1992 pursuant to a request by the parents. Three issues were discussed during the hearing: (a) whether an acceptable IEP could be implemented in the public schools, (b) whether Scott's (then) current placement provided appropriate role models for him, and (c) whether Scott was entitled to compensatory education. On

January 7, 1993 the Hearing Officer ordered the District to develop an IEP that would provide academic, social, and vocational instruction with blind peers. Additionally, the District was to make sure "that instruction during school hours be reinforced in activities during other hours of his day; that instruction be guided by his progress in daily living and vocational training activities; and that his educational program and placement be reviewed at least annually." The Hearing Officer awarded compensatory education conditional upon Scott's achievement of the IEP's goals by the time the annual review. The inevitable effect of this decision, as confirmed by the parties, was a residential placement for Scott in order for the District to satisfy the condition of "during other hours of his day" for the IEP.

The District filed numerous exceptions to that order. These exceptions centered on two issues, the appropriateness of Scott's pendent educational placement, and the least restrictive alternative in light of the parents' request for a residential facility for Scott.

The panel concluded that the Hearing Officer did not apply the correct legal standard in determining the appropriate educational placement for Scott. We also concluded that he erred in his application of the least restrictive alternative by ordering a residential facility. We agreed that Scott was entitled to compensatory education, but found that the Hearing Officer had not provided a rationale for his award.

The panel ordered that the Hearing Officer's order be affirmed with modifications, specifically deleting the condition of "during other hours of his day." We awarded compensatory education for a period of six months beyond Scott's statutory eligibility and provided a rationale for said award.

DISCUSSION

In its original and renewed deliberations, the panel carefully reviewed the issues presented at the hearing. We found that the 11-18/92 IEP contained additional provisions not found in the 11/27/91 IEP. For example, the '92 IEP listed psychological counseling as an additional related service. It also listed goals and objectives pertinent to Braille instruction and an individualized transition plan (ITP).

The panel agreed with the Hearing Officer that a significant difficulty in evaluating the appropriateness of the proposed '92 IEP with Scott's failure to attend his school program for a full. the officer speculated that, if Scott did not go home at 1 p.m., he could have trained in daily living skills provided at the school. The panel concluded that the District attempted to provide Scott with an appropriate IEP but, in part due to Scott's apparently fragile nature, Scott had not availed himself of the services offered to him.

The panel also found that there was sufficient evidence in the record so as to allow the officer to find that the District had attempted to provide Scott with an IEP that would permit him an opportunity to interact with peers. While the opportunity to interact, as provided by the District, may not be have been ideal or optimal, nevertheless, the panel concluded that the District had acted in a manner that would have allowed Scott to reasonably benefit from his placement, in this context of interaction with peers.

The panel noted that the Hearing Officer's order pertinent to the IEP essentially affirmed the provisions which the 11-18-92 IEP contained. Further, we found that the only significant change ordered by the

officer was the phrase, "during other hours of his [Scott's] day," a phrase inserted by him at the end of the provision for ordering that instruction during school hours be reinforced by other activities. We concluded that the effect of this phrase, as a modifier to the reinforcing activities, could only be accomplished by activities in a residential facility. The panel believes that there was insufficient evidence in the record for the Hearing Officer to conclude that Scott required that activities be reinforced during other hours of the day, i.e. in a residential facility. The panel also considered whether the IEP could be implemented by the District. We concluded that the Hearing Officer erred in his application of the least restrictive alternative. Thus, the panel declined to affirm this specific language in the order.

In its considering of the award for compensatory education, the panel found that the Hearing Officer did not provide an adequately reasoned rationale for the award of six months for Scott beyond his 21st birthday. Our rationale is premised on the District's failure to provide an appropriate IEP for the period 11-91[1] through 11-92, equitably balanced against the parents' arrangements which in effect contributed to Scott's limited opportunity for reasonable progress. Thus, we awarded Scott six months of compensatory education.

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[1]Thus, our conclusion was that the previous IEP was inappropriate.

Accordingly, the panel clarifies that the most recent IEP (11-18-92), the focus of the due process hearing and the subsequent appeal, was "reasonably calculated to enable the child to receive educational benefits."[2]

Anne Hartwig, for the Appeals Panel

Dated this 27th day of April, 1994.

[2]See Board of Educ. of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206-07, 102 S.Ct. 303; 73 L.Ed. 2d 690 (1982).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARLISLE AREA SCHOOL DISTRICT, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-93-458
SCOTT P. by and through his guardians, BESS P. and RICHARD E. P., Defendant	:	

O R D E R

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

We are considering the appeal of the Carlisle Area School District from the decision of the Pennsylvania Special Education Appeals Panel issued in March, 1993. We exercise jurisdiction according to 28 U.S.C. Section 1331 and 20 U.S.C. Section 1400., et seq. The parties have submitted a stipulated record and a hearing to take additional evidence was held January 24, 1994.

We have carefully reviewed the opinions below of the hearing officer and the Pennsylvania Special Education Appeals Panel. We must agree with the school district that the decision of the appeals panel does not clearly indicate whether the panel's members concluded that the individualized education program ("IEP") offered by the Carlisle Area School District was appropriate. Much of the decision suggests that the panel found the IEP acceptable:

> Thus, the panel agrees with the Hearing Officer

> that the District provided sufficient evidence that Scott's educational program is intended to provide him an opportunity to interact with peers (the blind student and the head trauma students); that the District has attempted to provide him with specialists and itinerant teachers; and, that his primary educational needs are for vocational training, improved social/ emotional development, and self-care skills. The panel rejects the legal conclusion, however, that Scott's IEP must be implemented in an out-of state, residential setting.

Record at 69a-70a. This excerpt would seem to support a conclusion that the appeals panel found the Carlisle IEP adequate. However, the panel's order directs the district to develop an IEP for Scott including certain components, language suggesting that the proffered IEP was sufficient. Further, the panel ordered the district to provide Scott with six months of compensatory education, an award that is only appropriate upon a finding, inter alia, that the IEP offered was inappropriate. See Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990).

Thus, we are confronted on appeal with an ambiguous appeals panel decision. A federal court reviewing an ambiguous agency decision may remand the case to that agency for clarification. See, e.g., Southwest

Merchandising Corp. v. N.L.R.B., 943 F.2d 1354, 1361 (D.C. Cir. 1991); State of Wyoming v. Alexander, 971 F.2d 531, 541 (10th Cir. 1992). While we recognize the importance of an efficient resolution of this matter, we cannot properly perform our reviewing function without clarification, if for no other reason than our obligation to "due weight" to the agency determination. Fuhrmann v. East Hanover Board of Educ., 993 F.2d 1031, 1034 (3d Cir. 1993). Therefore, we remand the matter to the Pennsylvania Special Education Appeals Panel for clarification as to the following issue: was the conclusion of the panel's March 3, 1993, order that the IEP offered by the Carlisle Area School District was "reasonably calculated to enable the child to receive educational benefits"? Board of Educ. of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 206-07; 102 S.Ct. 303; 73 L.Ed.2d 690 (1982).[1]

AND NOW, this 30th day of March, 1994, it is ordered that:

1. This case is remanded to the Pennsylvania Special Education Appeals Panel for clarification of the issue described in this order.

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[1]We believe the appeals panel and the hearing officer focused on the question of whether a residential placement was necessary for Scott. The hearing officer concluded that it is, while the appeals panel disagreed. Our consideration must focus not on what the best program would be for Scott, but on whether that which Carlisle offered was appropriate within the Rowley definition.

2. The appeals panel shall file such clarification with this Court within 30 days of the filing of this order.

3. The Court retains jurisdiction over this case.

4. The Clerk of Court shall forward a copy of this order to Ms. Anne Hartwig, 118 Colwyn Lane, Bala Cynwyd, Pennsylvania 19004.

William W. Caldwell
United States District Judge

THE SPECIAL EDUCATION APPEALS PANEL
COMMONWEALTH OF PENNSYLVANIA

IN RE THE EDUCATIONAL ASSIGNMENT OF SCOTT P. A STUDENT IN THE CARLISLE AREA SCHOOL DISTRICT	: SPECIAL EDUCATION : OPINION : NUMBER 590

BACKGROUND

Scott P. is a 20 year old student in the Carlisle Area School District (hereinafter, the District). Scott is blind, brain injured, and medically involved.[1] He has received educational services in a physical support class operated by the Capitol Area Intermediate Unit (IU) since the 1990-91 school year. Scott was assigned to a vocational program, the Vocational Industrial Training and Education Center (VITEC) during the January to May 1991 semester and for the entire year of 1992. during the first period of enrollment, he learned some of the assigned tasks and showed some improvement.[2] However, during the second block of instruction, and the subsequent semester, Scott was frequently

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[1]Scott was injured in a swimming pool accident in August 1980. According to A.I. duPont Institute, he has the following medical problems: closed head injury, cortical blindness, right spastic hemiplegia, irritable bowel syndrome, gastroesophageal reflux, von Willebrantdt's disease, temporomandibular joint dysfunction, status post cholecystectomy, status post ventriculoperitoneal shunt, and vocal cord weakness. See Noted Transcript (N.T.) and School District Exhibit (S.D.) 24.

[2]See N.T. II at 161, 162

absent primarily due to medical reasons.[3]

Scott's current placement is at the Mechanicsburg High School in a physical support class operated by the IU. In his current IU class, there is one other blind student and several other students with head trauma. Three students, including Scott and the other blind student, use wheel chairs as the primary means of mobility. Scott attends school from approximately 8 a.m. to 1 p.m. daily including his lunch break. He then return home by bus in order to rest prior to appointments for other services such as physical therapy, psychological counseling, and medical visits.[4]

His program includes a number of services provided by the classroom teacher, specialists, and itinerant teachers. For example, Scott's itinerant vision teacher provides training in Braille and mobility training is provided by an Orientation and Mobility Specialist.[5] In addition, Scott's Individualized Educational Program (IEP) includes objectives for prevocational training at VITEC and Community Based Instruction (CBI) to provide social skills enhancement.[6]

During the fall of 1991, Scott's parents notified the District that they were not satisfied with Scott's progress in his educational program. In September 1992

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[3]Scott had gall bladder surgery and a three week assessment at the duPont institute during this time. See S.D. AT 22, 25.

[4]See N.T. I at 1, 41.

[5]See N.T. I at 63, 82, 113, 121, 122. See also N.T. II at 27, 150.

[6]See S.D. Exhibit 1.

Scott's parents requested that he be placed in a residential program at the Maryland School for the Blind. The District denied the request and the matter was scheduled for a hearing. The hearing took place on December 3, 15, and 17, 1992. Three issues were discussed during the hearing: (a) whether an acceptable IEP could be delivered in the public schools, (b) whether Scott's current placement provided appropriate role models for him, and (c) whether Scott was entitled to compensatory education.

The Hearing Officer ordered the District to develop an IEP that would provide academic, social, and vocational instruction with blind peers. Additionally, the District is to provide "that instruction during school hours be reinforced in activities during other hours of his day; that instruction be guided by his progress in daily living and vocational training activities; and that his educational program and placement be reviewed at least annually."[7] Compensatory education was awarded conditional upon Scott's achievement of the IEP's goals by the time of the annual review. The inevitable effect of this decision, as confirmed by the parties' briefs, is a residential placement for Scott in order for the District to develop an IEP that will satisfy the condition of "during other hours of his day."

The District filed ten exceptions to the Order. The exceptions center on two issues, namely, the appropriateness of Scott's current educational placement and the least restrictive alternative with regard to Scott's residential placement. The District alleges that it can provide Scott with a meaningful IEP and can deliver the appropriate program in a public school setting. The District posits that Scott is

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[7]See Hearing Officer's Order at 9.

not entitled to compensatory education since it attempted to provide an appropriate educational placement and did not act in bade faith or in any manner restrict Scott from obtaining said placement. Therefore, it concludes that Scott is not entitled to compensator education since he was not deprived of or denied an appropriate placement.

DISCUSSION

In ordering the District to develop an IEP that would provide Scott with services with blind peers during other hours of the day, the Hearing Officer applied the wrong legal standards, the panel finds that the Hearing Officer erred by not applying the proper standard in determining the appropriate educational placement for Scott. We also find that he erred in applying the standard of least restrictive alternative and ordering a residential placement. We do find, however, that the order correctly mandates the development of an IEP that incorporates the elements of academic, social, and vocational training in Scott's educational program. We find that the award of compensatory education, although proper, lacked a reasoned analysis. In this case, the Hearing Officer did not provide a rationale for his award.

IEP/Placement

The issue of appropriate education placement presents mixed questions of fact and law. There is ample judicial authority that the standard of review to apply when there are mixed questions is de novo, at least for the legal component.[8] In this case, the

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[8]See e.g., Christopher M. v. Corpus Christi Indp. School Distr., 933 F.2d 1285, 1289 (5th Cir. 1991); Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 293 (7th

Hearing Officer included conclusions of law within his enumeration of facts making it difficult to properly sort out those matters to be reviewed and those to be given deference.[9] The panel properly reviews the legal conclusions and accepts with due deference the findings of fact. Thus, the panel agrees with the Hearing Officer that the District provided sufficient evidence that Scott's educational program is intended to provide him an opportunity to interact with peers (the blind student and the head trauma students)[10]; that the District has attempted to provide him with specialists and itinerant teachers[11]; and, that his primary educational needs are for vocational training, improved social/emotional development, and self-care skills.[12] The panel rejects the legal conclusion, however, that Scott's IEP must be implemented in an out-of state, residential setting. The panel further rejects the specific provision that Scott must be provided an opportunity to interact with blind peers during non-school hours by the District. It is clear from the record that both the parents and the District have made decisions about Scott's educational programming that have had significant impact on Scott's program. For example, the decision to shorten Scott's day made by his parents had direct consequences for programming. The District's use of itinerant teachers also

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Cir. 1988), cert. denied, 488 U.S. 925 (1988); Gregory K. v. Longview School Dist., 811 F.2d 1307, 1310 (9th Cir. 1987).

[9]footnote missing

[10]See N.T. II at 27, 48-9, 150

[11]See N.T. II at 27, 48-9, 150

[12]See N.T. at 131, II at 109-10, 118-22, 166, 188-89, and III at 80.

has an impact on providing continuity and consistence of programming.

Scott's lack of progress is not sufficient to allow the Hearing Officer to conclude as a matter of law that Scott should receive a residential placement. The reason(s) why Scott had not made the anticipated progress in his educational placement remain unclear. The record seems to indicate consensus about Scott's difficulty in accepting blindness.[13]

The panel points out that the standard to be applied in deciding whether or not Scott's placement is appropriate is a reasonable calculus sufficient to allow meaningful benefit; and educational placement may be appropriate even though not optimal.[14]

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[13]A vocational counselor stated that Scott "has not learned to deal with life as a blind person." See N.T.S.D. at 18. This statement is not disputed by the vision specialist, Scott's private psychologist, the school psychologist, and the classroom teacher. the records seems to indicate that this inability or unwillingness by Scott to accept his handicap may account for his apparent lack of progress as anticipated by his teachers and parents. The issue, however, is whether more contact with blind peers is the remedy or whether increased skills will help Scott accept his handicap.

[14]For example, the Hearing Officer states, "In a residential enter, occupational and physical therapy, speech, language, and life skill activities in the residence area can be incorporated in the IEP, delivered in hours other than the school day, and can be integrated with classroom activities." See Hearing Officer's Order at 5. the panel does not disagree with the finding that a residential facility may, in fact, do all of the above.

Least Restrictive Alternative

The relationship between appropriate placement and least restrictive alternative is properly addressed by the Hearing Officer in this case. The facts presented indicate that Scott's IEP for the 1992-93 school year includes CBI and VITEC. Additionally, the only sheltered workshop serving Scott's county of residence is the Center for Industrial Training (CIT) in Mechanicsburg. The District indicates that placement in a transition class at CIT operated by the IU might be possible if Scott continues his prevocational training at VITEC.[15] There is evidence in the record that Scott would have an advantage in securing employment at CIT if he attended CIT's transition class and that Scott's future independence is an agreed upon goal by all.[16]

The Hearing Officer's conclusion that Scott

However, the Hearing Officer's conclusion that Scott is entitled as a matter of law to a residential placement cannot be based solely on this fact. The legal standard to be applied in deciding whether or not a placement is appropriate is found in Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). In Rowley, the Court found that the placement must be enough so as to make special educational meaningful. The benefit to be derived from an educational placement is, thus, that it be reasonably calculated for Scott to meaningfully benefit from his program. Maximum benefit is not required. Therefore, the fact that a residential facility may provide better services may be accurate but it is not the standard to be applied.

[15]See N.T. I at 60-61, 78; II at 164-71, 165-70.

[16]See N.T. II at 169-70.

must then be entitled to a residential placement is incorrect. The standard to be applied in determining the least restrictive alternative is not to find an optimum placement for Scott but rather to decide whether an appropriate educational placement can be achieved in a non-restrictive setting. In this case, Scott has not even attended a full day school program. It is unclear whether he can participate in a program that would require him to spend significant portions of the day in what appears to be a more intensive program at the Maryland School for the Blind. It is also unclear from the record whether the parents and the school have fully exhausted all non-residential and in-state possibilities for Scott as required by Pennsylvania's statutes.[17] It is difficult to conclude from the record that the District has fully investigated other possible placement sites or, if no such alternatives exist, whether the District should develop a specific program for Scott.

Applying the LRE standard to the facts in this case, the panel finds that Scott's program does not necessarily require that it be delivered in a non-residential facility. We note the Hearing Officer's conclusion that a residential placement may be better able to deliver a full range of services for Scott; while this may be correct, it is not the legally correct LRE.[18]

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[17]22 PA CODE Sec. 14.44(a)(1).

[18]The Hearing Officer's finding that "the current placement is restrictive for Scott in that he does not have blind peers who are achieving in keeping with their abilities/disabilities to model appropriate behavior and encourage him to reach levels reasonably expected of him by teachers, vision specialists, mobility specialists, and psychologists" misses the mark. This

Compensatory Education

The panel agrees with the Hearing Officer that Scott is entitled to compensatory education but disagrees with him as to the underlying rationale for the award.

Compensatory education is properly awarded when: (a) a school district has knowingly failed to provide an appropriate education placement[19], or (b) a district has acted in bad faith and the district's actions have resulted in a denial of FAPE.[20] In either case, upon balancing the equities in a case, an equitable award may be ordered.[21] An administrative review panel such as the Special Education Appeals Panel may order compensatory education as an equitable remedy.[22] Thus, an award of compensatory education has significant judicial authority.

The Hearing Officer did not provide a rationale for awarding Scott compensatory education for a six month period beyond his

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finding in and of itself does not necessarily lead to the conclusion that a residential placement is less restrictive or required.

[19]See Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990), cert.denied, 111 S.Ct. 1317.

[20]See Manchester School District v. Christopher B., 19 IDELR 389 (D.N.H. 1992); Harris v. Dist. of Columbia, 19 IDELR 389 (D.N.H. 1992); Harris v. Dist. of Columbia, 19 IDELR 105 (D.D.C. 1992).

[21]id.

[22]See Big Beaver Falls Area School District v. Jackson, 615 A.2d 910 (PA Commw. 1992).

21st birthday. The record in this case indicates that the District knew as early as the fall of 1991 that the parents were unhappy with Scott's lack of progress in his placement. There is no indication that, during the 1991-92 school year, the District took any significant measures to change Scott's IEP, for example, or to provide any additional services for Scott. The parents, however, also failed to make full use of the services provided for Scott. The parents' decision to shorten Scott's school day, even though justifiable, essentially prevented the District from evaluating whether or not Scott could benefit from the programs it did have available.[23]

ORDER

Accordingly, this 3 day of March, 1993, the Hearing Officer's order is modified to the extent that it complies with the specific provisions set below. Exceptions not addressed in this order are dismissed.

The District shall develop an IEP for Scott that will include academic, social, and vocational instruction with blind peers; that instruction during school hours be reinforced with appropriate activities as tolerated by Scott; that instruction in school be guided by his progress in daily living ad vocational training activities; and that his educational program and placement be reviewed at least annually.

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[23]While we are sympathetic with the parents' attempts to do the very best they can to accommodate Scott's appointments for therapies, nevertheless, the panel is not persuaded that this is sufficient to overcome the fact that the District is attempting to provide Scott with a reasonable and appropriate program.

The District shall provide Scott with compensatory education consistent with an appropriate placement as determined by his IEP for a period of six months beyond his statutory eligibility.

In accordance with 22 PA CODE Sec. 14.64(m), the parties are advised that this matter may be appealed to the Commonwealth Court of Pennsylvania or to the appropriate federal district court.

_____

Anne Hartwig for the Appeals Panel

Date signed: 3/03/93

Date mailed: 3/03/93

118 Colwyn Lane
Bala Cynwyd, PA 19004
March 3, 1992

Dear Ladies and Gentlemen:

Enclosed please find the Special Education Appeals Panel's decision, In Re The Educational Assignment of Scott P., Appeals Opinion No. 590. Thank you.

Sincerely,

_____
Anne Hartwig
for the Appeals Panel

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SCOTT PROSSER

DOB: February 12, 1973

Hearing: December 3, 15, 17, 1992

Closed

Parties to the hearing:

Mr. & Mrs. Richard E. Prosser
represented by Larry B. Selkowitz, Esquire

Carlisle Area School District
contact person David C. Apgar
Director of Special Education
represented by Frank P. Clark, Esq.

Capital Area Intermediate Unit 15
contact person Alan Gamble

Date transcript received:
Vol I December 10, 1992
Vol II December 22, 1992
Vol III December 23, 1992

Date of Decision: January 7, 1993

Joseph L. French

Special Education Hearing Officer
Joseph L. French
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II. Background

Scott Prosser is a 19 year old, blind, brain injured, and otherwise medically involved student receiving educational services in a physical support class. Mobility is a problem. Most often he moves in a wheel chair. Injury to the brain occurred in August 1980 in a swimming accident. Scott has received educational services from the Carlisle Area School District, his home district, and the Capital Area IU in a number of class rooms with a large numbers of teachers and related service and support personnel (N.T.1;111,4). He has been in the physical support class, with related services, operated by the IU since the 1990-91 school year. The district believes the proposed IEP meets his needs and can be delivered in a local school whereas the parents believe he needs educational placement in an approved private school in Maryland - the facility closest to their home serving blind students. They believe that he can and should become more independence. To become more independent, they believe he needs to be exposed to and associate with blind peers who are successfully accomplishing educational and related tasks within the limits of their disabilities.

In addition, the Prossers believe that, because negotiations have been in progress since last summer, a semester should be added to the end of his normal school career as compensation. They believe an intense, coordinated program over the next two years is essential.

Negotiation between the parties has occurred over several months. A pre-

hearing conference was held on the originally scheduled hearing date of November 12, in hopes of achieving a settlement.

The district requested a subpoena for Scott which was denied. The observable physical characteristics of a student cannot be captured in the record except as described by witnesses and exhibits and the student has been adjudicated incompetent.

The district requested a subpoena for Kevin Capp, a vocational rehabilitation counselor in the Bureau of Blindness and Visual Services (BVS) which was issued December 1, but on December 2, Myra W. Sacks, Assistant Counsel for the Department of Public Welfare, advised the parties and the hearing officer, that the BVS may not release personal information without a judicial order (NT I, 93-95 and SD 43 and 44). A judicial order was not obtained.

II. Findings of Fact

Scott, brain injured in any August 1980 accident, has the following principal diagnoses according to A.I. duPont Institute: Closed head injury, cortical blindness, right spastic hemiplegia, irritable bowel syndrome, gastroesophageal reflux, Von Willebrandt's disease, temporomandibular joint dysfuction, status post cholecystectomy, status post ventriculoperitoneal shunt, and vocal cord weakness (NT SD 24).

His mother reports that he has recurrent sinus and strep infections, migraine headaches, gastrointestinal problems, hepatitis C, and depression (NT III,7).

School personnel consider him to be blind and physically and mentally disabled (NT III,4).

Scott completed regular kindergarten and first grade prior to the accident (NT III,4).

He has been enrolled in a number of special education programs and settings since the accident and hospitalization:
3/81-6/81, EMR, Bellaire Elementary School, Carlisle Area SD*
1981-82, neurodevelopmental program, Lincoln Center, CAIU
1982-83, neurodevelopmental program, Rossmoyne Elementary, CAIU (same teacher)
1983-86, neurodevelopmental program, Middlesex Elementary, CAIU (closer to Scott's home)
1986-88, EMR, Wilson Middle School, Carlisle Area SD (w/individual aide to support classroom teacher, communicate information from IU consultants and provide consistency, and to provide for his individual needs NT I, 31)**
1988-90, EMR, Swartz Intermediate HS, Carlisle Area SD (to be with students of same age and cognitive legal NT 1, 33 and w/individual aide with same functions NT I, 31)**
1990-, physical support program, Mechanicsburg HS, CAIU**

* CA IU provided vision services from 1981
** CAIU provided vision, mobility, and computer services for Scott (NT I, 19-22)

A wheel chair is his primary means of mobility (NT II, 8). He does use a walker sometimes, but not in school (NT II, 8).

Scott's IEP for 1991-92 and the one proposed for 1992-93 included, among others, objectives to provide Scott with functional science, math, social studies and English; the social skills, self help and personal living skills necessary for adult life; and work adjustment skills to help him make the transition from school to work (NT

I, 25 and SD 30 and 1; 60-61).

There are no blind and brain injured students and no blind students this year in the Carlisle Area SD. (NT 1,26).

In his current IU operated class, there is a blind student (NT I, 33) who works with Scott in some academic activities with an aide (NT I, 44-45 and 57). Scott like to listen to classical music, the other boy does not. The other boy likes sports but they do not interest Scott (NT I, 57). The other boy has light vision and more mobility than Scott but very little arm strength or finger dexterity (NT I, 59).

In his current class there are two other students with head trauma and who are on same level of cognitive functioning as Scott; others who need life skill education (NT I, 38), and three with no physical handicaps who are of a lower-functioning nature (NT I, 39) or TMR (NT I, 68). Three, including Scott and the other blind student, use wheel chairs much of the time (NT I, 39 and 68).

Scott is in class from approximately 8 a.m. to 1 p.m. including a half hour for lunch. At 1 p.m. he goes home by bus to rest prior to appointments for various health services providers independently of the school program (NT 1, 41). He has physical therapy two days a week and psychological counseling one day a week. Appointments with physicians and other health care providers are scheduled other days late afternoon (NT III, 14), usually between three and five (NT III, 16).

There are a number of itinerants and consultants who held with Scott's program. (NT I, 48-49).

He uses Braille textbooks and reads Braille menus and labels in the class room and elsewhere (NT I, 103). He can make lists to guide his activities, write letters, etc. with a Braille writer (NT I, 105). He is an excellent typist and uses a computer with audio out put of what he types (NT I, 106).

Scott likes classical music, riddles, word games, geography, and weather. He understands situations enough to appreciate humor (NT I, 53). He appears to enjoy social interactions in the class room (NT I, 54). He is a willing participant but seldom an initiator of conversation (NT I, 55). He enjoys working on a computer which is labeled in Braille (NT III, 5). He likes science topics more than math (NT III,5). At home he enjoys playing Monopoly, Yahtzee, and Racko (NT III, 66).

He needs no assistance in the bathroom and he can feed himself (NT I, 82).

Scott's current class room teacher has been with him since the 1990-91 school year. He has not made the gains she anticipated (NT I, 62-63). He has maintained most skills but he hs made little further progress (NT I, 66 and 81). Academic achievement is reported to the parents in terms of percent of items answered correctly on a teacher constructed test based on activities (NT SD 2 and 1, 87-91). Gains have been shown with this system of reporting but, for the last few years his academic achievement, as determined by his teach has been (only) maintained (NT I, 66) and when measured by standardized tests has continued to be a the fourth to fifth grade level (NT III, 5).

With a longer school day his teacher believes he would gain (NT I, 63). Being both brain injured and blind requires

more time than is available in a regular school day (NT III, 87-88). He has an IQ in the low average range (P 1) and viewed as capable of learning more than he has (NT III 92 and 100; I, 62-63).

He has made progress in reading and writing Braille (NT I, 113 and 121-122). However, he has not made progress with his computer (NT I, 113).

Orientation and Mobility (O & M) training is anticipated from the class room but has not been scheduled to date (NT I 69). In the two and one-half years with his current teacher, she has not seen an improvement in his mobility (NT I, 72). He is still inconsistent (NT I, 84).

The O & M specialist believes Scott should have another assessment, one which would include use of a relatively new piece of electronic equipment (the Pathfinder), and consultation with the class room teacher, vision itinerant and aides in the class room. Scott has reached his potential for independent travel and will not receive direct services except in how to use the Pathfinder if it is appropriate for him (NT II, 137 and 148).

The O & M specialist, who has known him for more than 10 years, believes that his skills and abilities have stayed about the same in recent years (NT II, 150).

There are mixed options about his potential for increased walking. His private physician (through his private therapist) has limited the distances he is permitted to walk in the school building to the class room and the school physical therapist adheres to the recommendations of Scott's private physician/physical therapist (NT II, 9-14 and 18). The physical therapist provided by the school believes he needs to walk more frequently and in other

locations (NT II, 27).

If Scott did not go home at 1 p.m., he could have training in daily living skills in the home economics suite until dismissal three days a week (NT I, 67). Last year, Scott was in attendance some days for all of the school day, the home economics suite was used three times (NT I, 71).

In a residential center, occupational and physical therapy, speech, language, and life skill activities in the residence area can be incorporated in the IEP, delivered in hours other than the "school day," and can be integrated with class room activities (NT III. 89-91; 101).

There is a plan for Scott to attend a Vocational Industrial Training and Education Center (VITEC) program every other week from 9 a.m. until 2 p.m. (NT I, 85) in the next semester. If the plan goes into effect, he would not have time for daily living skills training in the home economics suite on the days he is in the VITEC NT I, 86).

The other blind student in Scott's class is not eligible for VITEC (NT I, 59).

Scott was assigned to VITEC January to May 1991 and 1992. During the first enrollment he learned some of the tasks and showed improvement in his behavior and in his relationships with supervisors and co-workers (NT II, 161-162). He attended 20-22 of the first 36 day block of instruction (four days a wee, every other week for nine weeks) but only four days of the second in which he was scheduled only each Wednesday for nine weeks. He seemed to regress during the second session. He remained at the "pre vocational" level (NT II, 162).

During the second semester 1991-1992 Scott was absent from his local educational program to attend the duPont school for a three week assessment (SD 22) and for gall blader surgery (SD 25).

Scott responded to the McCarron Dial test at VITEC and at the Maryland School for the Blind. At Maryland, norms for the blind were used. The IU vocational special believes interpretation from the two administrations would be about the same (NT II, 164).

After finishing his education, the IU vocational specialist believes Scott could find sheltered employment and perhaps move up from there over time (NT II, 165). Employment in this area is reported to be better for people who have had pre vocational training in this area than for those who have it elsewhere (NT II. 171) but referral form MH/MR, OVR, or other agencies have been successful (NT II, 170).

A vocational counselor believes that Scott "has not learned to deal with life as a blind person" (NT SD 18). He class room teacher does not disagree (NT I, 80). He itinerant vision specialist provided by the school does agree (NT I, 125 and 127) as does the psychologist employed by the parents (NT II 46-48 and 68), the school psychologist (NT II, 102) and the Director of Diagnostic Services for the Maryland School for the Blind (NT III, 80).

The psychologist retained by the parents to provide weekly psychotherapy for the past 16 months believes he has not fully adapted to his visual and physical handicaps (NT II, 35-37) and that he needs to develop social and assertive skills, to express his feelings, and to learn how to ask for help from other people (NT II, 34 and 75-77). Although brain injured and having difficulty processing information, Scott is capable of

abstract thought and insight. Scott has not progressed from being a dependent child to an independent person in keeping with his disabilities (NT II, 50).

By learning to do more things for himself, Scott will have more control over his environment which should reduce his anxiety and feelings of depression (NT III, 82).

In addition to regular therapy, Scott needs help from peers with similar problems when he exhibits denial (NT II, 38-40 and III, 83). The weight of peer influence at critical moments throughout the week is much greater than the weight one or two regularly scheduled therapy sessions (NT II, 40). He needs contact with other people who are equally disabled but more independent(NT I, 42; III, 96). He needs programming beyond typical school hours to have sufficient intensity to make additional gains (NT II, 44 and 46-47 and 51; III, 94).

Scott has individual half hour therapy sessions scheduled once a week with the school psychologists serving the building. However, only four sessions have been conducted in the past four months due to scheduling programs or absences (NT II, 95. He believes that continuation of Scott's program in the current setting, with the half hour of individual therapy he is providing for Scott's anxiety disorder, will be adequate (NT II, 109-110 and 118-122).

The school psychologist believes residential placement would be a difficult adjustment for Scott psychologically and that he needs non-blind mentors more than blind mentors (NT II, 105). He believes residential placement would limit Scott's opportunity to benefit from experiences in the community where he will be living (NT II, 112) and that more factors than blindness need to be addressed (NT II, 116).

The itinerant vision teacher has found, in other settings that groups of non sighted peers discussing common problems during school hours has been helpful (NT I, 126) but such sessions are not indicated in Scott's proposed IEP (NT III, 127).

The Maryland School for the Blind reports that more than three fourths of their students stretch their accomplishments while associating with blind peers (NT III, 97).

His teachers agree (NT I, 80 and 131) that Scott's "egocentric and reactive way of relating to the world around him must change for him to begin to benefit from the training and education he will receive" (NT SD 21).

The master vision specialist believes Scott will need help from those who interact with him in the educational program to improve his social skills (NT II, 188-189).

Scott's parents have arranged for several disabled persons to come to their home once a month and a friend, who attended a college in another, comes to the home to see Scott when he is in town (NT, III 8 and 42).

A classmate has been invited to come to the Prosser home but did not come and Scott's teacher was not encouraging about the possibility of the other blind student being able to socialize with Scott during non school h ours (NT III, 9 and 43).

Scott has attended camps for about a week each summer since he was nine or ten years of age and has made a satisfactory transition from one school or class within a school to another (NT III, 24).

At the present time his primary educational needs are for vocational training (NT II, 166 and III, 80) and for improving his social/emotional development and self-care skills (NT III, 80 and I, 131 and II, 109-110 and 118-122 and 188-189).

The parents requested consideration of private school placement in August 1991 (NT II, 25) and placement in the Maryland School for the Blind orally June 4, 1992 and in writing on September 2, 1992 (NT III, 27).

School personnel began investigating the availability and appropriateness of private schools in May of 1992 (SD 15) and in the summer of 1992 (NT II, 180) and group homes in the community (NT II, 191). The master vision specialist corresponded with four schools in PA and with the Maryland School for the Blind and visited the Western (PA) School for the Blind once and Maryland School twice in the fall of 1992 (NT II 183).

The Director of the Western School for the blind informed the IU master vision specialist that most students in her school have "disabilities more severe in nature than those evidenced by Scott" and that "Since Scott will have a relatively small peer group" she recommended that the Prosser's visit the school to learn more about its environment (SD 5 and NT 201 and 202).

Scott has expressed anxiety and concern about residential placement (NT III, 114-116 and P 1). Anxiety and concern about such placement is typical (NT III, 120) and for most children overcome it in about two weeks (NT III, 121).

Those in attendance at this hearing who presented relevant testimony are as follows:

For the parents:
Bess Prosser, mother
Dennis J. Duda, Director of Diagnostic Services, Maryland School for the Blind
Wayne L. Trotta, Psychologist

For the school district:
David Apgar, Carlisle Area School District Director of Special Education
Penny Endrizzi, CA IU Classroom Teacher
Patricia Howard, CA IU Physical Therapist
Stacy Howard, Vision Itinerant Teacher
Robert Frett, School Psychologist
Marianne Smith, Vision Itinerant O & M
Rosemary Holecki, Master Vision Teacher

IV. Issues

Are the models provided by other students and significant adults appropriate in his current placement?

Can an acceptable IEP be delivered in the public schools or is residential placement necessary? Are there enough hours in the education program?

If placement in a residential facility is appropriate, should a half year of compensatory educational time be awarded?

V. Discussion

Scott was in a regular kindergarten and first grade prior to an accident which left him brain and blind. For more than 11 years he has been academically placed in a variety of special education classes and with a variety of children, only a few of whom have been blind. Currently, he is in a class with one student who may be considered a blind peer.

Scott has been at the same academic and pre-vocational level for several years; his mobility has not improved. Report cards, while reflecting learning in the activities provided, do not indicate progress. He is more dependent than would be expected for one with his disabilities. He has the ability to learn more and to be more independent but continuation of the program in force for the last several years seems unlikely to produce such results.

Little or no evidence was presented as to what school personnel would do differently in building social skills, reducing anxiety, or improving mobility than in the past. A pre-vocational program has been proposed but similar programs are available in a number of locations.

School personnel argue that residential placement will be restrictive in that Scott will not have sufficient opportunities to meet with regular non handicapped students or students with other handicaps. However, he has had such opportunities for the past decade. Evidence presented suggests that the current placement is restrictive for Scott in that he does not have blind peers who are achieving in keeping with their abilities/disabilities to model appropriate behavior and encourage him to reach levels reasonably expected of him by teachers, vision specialists, mobility specialists, and psychologists.

School personnel argue that he is going to live in a real world and needs to be trained in the real world but his progress under those conditions has not been up to their expectations. Whereas placement in a residential school is considered to be restrictive than in a public school building for many children, Part B of the Education of the Handicapped Act (EHA-B) requires that

each child who is disabled be provided a free appropriate public education (FAPE) in the educational setting appropriate to meet the needs of that child. Since 1981 Scott has been in public school buildings in an attempt to maximize his association with children who are not disabled and in classes with children who are not disabled or who have other disabilities. Success in these placements has not met the expectations of professionals associated with him and do not meet his needs as an individual.

Scott is reported to have poor ability to generalize but, while agreed to by both parties, this point was not addressed fully by those testifying. Does he generalize as much as would be expected of someone with an IQ in the 80s and with the educational program provided? He can remember some items/topics better than others, but so do all people. Experts for both parties suggested that with extended education and training he can learn more than he has.

He has limited intellectual capacity and physical endurance. Placement in one setting or another will not increase either. However, the testimony revealed little communication between the specialist employed by the schools and by the parents and none between the psychologists conducting therapy with Scott during the past fall.

School personnel contend that communication will not be improved in a residential setting because the residential staff are paraprofessionals, not professionals. This argument has little strength. An argument could be made that because they are paraprofessionals, they will listen to the professionals instead of forging their own program separate and distinct from that delivered during school hours.

Scott has been in several classes in different school buildings. He has attended a summer camp apart from his parents for about 10 years. Separation from the parents for five days at a time may cause anxiety and concern, and for a boy with his ability such would be expected. However, separation anxiety in residential students is usually of short duration.

Scott has not been in classes or, for any length of time, with blind peers of his ability level (or of less than his mental ability) who are doing better than he is academically, socially, and/or vocationally. He needs to be exposed to blind adolescents who are accomplishing various things in keeping with their abilities. He needs a program that integrates academic activities with social and vocational activities throughout the day to reinforce those things taught in each setting. He needs to be taught not only by teachers and related specialist but by classmates with similar abilities/disabilities.

Placement in a separate facility will be the least restrictive environment for Scott Prosser, at least for the coming year.

The parents requested consideration of private school placement in August 1991 and placement in the Maryland School for the Blind orally June 4, 1992 and in writing on September 2, 1992. School personnel began investigating the availability and appropriateness of private schools in May of 1992. Because Scott had two years of FAPE remaining at the beginning of the current academic year and because a significant change in placement is needed, his educational program should be continued for two years from the date of this opinion.

VI Order

It is hereby ordered that an IEP be developed for Scott Prosser to include academic, social and vocational instruction with blind peers; that instruction during school hours be reinforced in activities during other hours of his day; that instruction in school be guided by his progress in daily living and vocational training activities; and that his educational program and placement be reviewed at least annually {See 34 CFR Section 300.550(b)(2) and 300.552}.

Should the annual review indicate that goals stated in the IEP are being achieved, the program should be continued for another year, i.e., six months beyond his 21st birthday, as compensation for the first half of the current school year {White v. California, 195 Cal. App3d 452, 240 Cal.Rptr. 732, 743 [42 Ed. Law Rep. 262] (1987) and Jefferson County Board of Education v. Breen, 85 F.2d 85 [48 Ed.Law Rep. 382](11th Cir. 1988).

Joseph L. French
January 7, 1993